

IN THE UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF NEW MEXICO

IN RE: SANTA FE NATURAL  
TOBACCO COMPANY MARKETING  
AND SALES PRACTICES LITIGATION,

NO. 16-MD-2695 JB/LF

Transcript of Motion Proceedings before  
The Honorable James O. Browning, United States  
District Judge, Albuquerque, Bernalillo County,  
New Mexico, commencing on June 9, 2017.

For the Plaintiffs: Ms. Melissa Wolchansky; Mr.  
Michael Reese; Mr. Scott Schlesinger; Mr. Reed  
Bienvenu; Ms. Marisa Glassman; Mr. Nicholas Koluncich

For the Plaintiffs (Via telephone): Mr. Jeffrey  
Haberman; Mr. Jonathan Gdanski

For the Defendants: Mr. Andrew Schultz; Mr. Peter  
Biersteker; Mr. William Coglianese

Jennifer Bean, FAPR, RDR, RMR, CCR  
United States Court Reporter  
Certified Realtime Reporter  
333 Lomas, Northwest  
Albuquerque, NM 87102  
Phone: (505) 348-2283  
Fax: (505) 843-9492

SANTA FE OFFICE  
119 East Marcy, Suite 110  
Santa Fe, NM 87501  
(505) 989-4949  
FAX (505) 843-9492



MAIN OFFICE  
201 Third NW, Suite 1630  
Albuquerque, NM 87102  
(505) 843-9494  
FAX (505) 843-9492  
1-800-669-9492  
e-mail: info@litsupport.com

1 THE COURT: All right. The Court will call  
2 In Re: Santa Fe Natural Tobacco Company Marketing and  
3 Sales Practices and Products Liability Litigation;  
4 Lead Case No. 16-MD-2695 JB/LF.

5 Let's start with the plaintiffs that are  
6 present. I don't know if we want to call these  
7 individual cases or not.

8 So why don't I just turn it over to you,  
9 Ms. Wolchansky, and let you sort of do the directions  
10 here.

11 MS. WOLCHANSKY: Sure. Good morning, Your  
12 Honor. Melissa Wolchansky, Halunen Law, Minneapolis.  
13 I'll let my co-counsel introduce themselves. I will  
14 be presenting today, as well as Mr. Reese, my  
15 co-counsel.

16 THE COURT: All right. Ms. Wolchansky,  
17 good morning to you.

18 MR. REESE: Good morning, Your Honor.  
19 Michael Reese on behalf of the plaintiffs, from Reese  
20 LLP. Good morning, Your Honor.

21 THE COURT: All right. Mr. Reese, good  
22 morning to you.

23 MR. SCHLESINGER: Good morning, Judge,  
24 Scott Schlesinger.

25 THE COURT: Mr. Schlesinger, good morning

1 to you.

2 MS. GLASSMAN: Marisa Glassman from Morgan  
3 and Morgan Complex Litigation Group. Good morning.

4 THE COURT: All right. Ms. Glassman, good  
5 morning to you.

6 MR. BIENVENU: Good morning, Your Honor.  
7 Reed Bienvenu, Rothstein Donatelli in Santa Fe.

8 THE COURT: Mr. Bienvenu, good morning to  
9 you.

10 Anyone else from the plaintiffs? How about  
11 on the phone?

12 MR. HABERMAN: Good morning, Your Honor.  
13 Jeffrey Haberman from Schlesinger Law Offices.

14 MR. GDANSKI: And good morning, Jon  
15 Gdanski, also from the Schlesinger firm.

16 THE COURT: All right. Mr. Haberman, Mr.  
17 Gdanski, good morning to you.

18 Anyone else on the phone?

19 All right. For the defendants?

20 MR. SCHULTZ: Andrew Schultz from the Rodey  
21 Law Firm for the defendants, Your Honor.

22 THE COURT: Mr. Schultz, good morning to  
23 you.

24 MR. BIERSTEKER: Peter Biersteker from  
25 Jones Day on behalf of the defendants.

SANTA FE OFFICE  
119 East Marcy, Suite 110  
Santa Fe, NM 87501  
(505) 989-4949  
FAX (505) 843-9492



MAIN OFFICE  
201 Third NW, Suite 1630  
Albuquerque, NM 87102  
(505) 843-9494  
FAX (505) 843-9492  
1-800-669-9492  
e-mail: info@litsupport.com

1 THE COURT: Mr. Biersteker, good morning to  
2 you.

3 MR. COGLIANESE: Bill Coglianesse from Jones  
4 Day on behalf of the defendants.

5 THE COURT: Mr. Coglianesse, good morning to  
6 you.

7 All right. Let me go over a couple of  
8 housekeeping measures. One is that Ms. Wild has been  
9 wanting to change the scheduling order that we  
10 entered early in the case, Document 37, that y'all  
11 would notify the Court in writing by letter. If it's  
12 all right with you, I think we're just going to enter  
13 an amended one that just says you can do this by  
14 electronic. There is no reason to have everybody do  
15 a letter and stuff. We'll just do it by CM/ECF  
16 filings. So anybody have any objection to that?  
17 You'll see an amended order, but it will be on page  
18 3, paragraph 2(a), next to the last sentence. I'll  
19 make that change because I think it would just be  
20 easier that if we have a status conference, people  
21 can notify us that they have no agenda items by  
22 CM/ECF, rather than trying to get some letter to the  
23 Court. So a little bit old school. Is that all  
24 right with the plaintiffs?

25 MR. SCHLESINGER: Yes, Judge.

SANTA FE OFFICE  
119 East Marcy, Suite 110  
Santa Fe, NM 87501  
(505) 989-4949  
FAX (505) 843-9492



MAIN OFFICE  
201 Third NW, Suite 1630  
Albuquerque, NM 87102  
(505) 843-9494  
FAX (505) 843-9492  
1-800-669-9492  
e-mail: info@litsupport.com

1 THE COURT: Defendants?

2 MR. SCHULTZ: No objection.

3 THE COURT: What I understand, and where we  
4 are with the case management order number 2 is that  
5 after today you will be waiting for a ruling from me,  
6 and that the defendants will answer the consolidated  
7 amended complaint 30 days after ruling on a motion to  
8 dismiss.

9 So we've been in a little bit of a stall  
10 pattern. And so today we'll then put the clock on me  
11 to get an opinion out to you. And then nothing else  
12 will occur until I get that ruling on the motion to  
13 dismiss. I will give some inclinations today as to  
14 where I'm going, but I don't think that constitutes a  
15 ruling until I get the opinion out. So if anyone has  
16 any different view of where we are in this case, let  
17 me know.

18 Let's see, I have a motion that I  
19 understand -- I did read it, and I don't think it's  
20 wasted time at all, because it helped me get into the  
21 issues. But I do understand that we're dealing not  
22 with the defendant's first motion to dismiss. We are  
23 instead dealing with the second motion to dismiss.  
24 So I understand the defendants are going to withdraw  
25 Document No. 70, and then we'll just be acting on the

1       operative. Is that correct?

2               MR. BIERSTEKER: That's correct, Judge.

3               THE COURT: All right. Do I hear any  
4       objection to the defendant withdrawing Document 70  
5       from the plaintiffs?

6               MS. WOLCHANSKY: No.

7               THE COURT: All right. So you just need to  
8       file a notice. You don't need to file a motion, just  
9       file a notice. You can indicate it's unopposed. And  
10      that will take care of that and clean it up off the  
11      docket.

12              Any other --

13              THE CLERK: No, sir.

14              THE COURT: Before we start, these are all  
15      the defendant's motions, so if the defendants want to  
16      proceed in a different way, they certainly can let me  
17      know. They want to go to the judicial notice motions  
18      or things like that. But I focused primarily on the  
19      motion to dismiss. Like I said, I started with  
20      Document 70, and then read Document 90. So I'll  
21      leave it to the defendants how they want to make  
22      their presentations today, whether they want to start  
23      with judicial notice or they want to start with the  
24      motion to dismiss.

25              Let me give you some thoughts, though, on

1 the motion to dismiss. I will certainly hear  
2 anything anybody wants to say on this. These are  
3 just my thoughts after reading the materials. So it  
4 will give you something to shoot at, at least you'll  
5 know what the judge is thinking.

6 As far as the defendant's FTC consent  
7 decree arguments that that is preemption, I guess I'm  
8 not, right at the moment, persuaded by that. The  
9 cases that you rely on is Southern District of  
10 Florida case, a Fourth Circuit case, Second Circuit  
11 case. I guess I think there has been a lot of water  
12 under the bridge since those 1990 cases in the  
13 preemption area. I know that's not been a completely  
14 linear trip at the Supreme Court. But it didn't seem  
15 like there was anything really binding either from  
16 the Supreme Court or the Tenth Circuit in that area.

17 So I was not persuaded that if I'm writing  
18 on a clean slate, I'm probably going to find an FTC  
19 consent decree to be preemptive of state law. I  
20 think the trend has been a little bit against that  
21 area, and in other areas. And so I was not persuaded  
22 by that. But you're welcome to argue it today.

23 It seems to me that when people litigate  
24 with the FTC or any agency -- I've had other agencies  
25 before me -- they often make certain deals and

1 litigation strategies in the context of trying to get  
2 a federal agency off their back. And so I'm not sure  
3 that -- administrations change, FTCs change, agencies  
4 change -- I'm not sure that we ought to find a  
5 consent decree to be preemptive of legislative  
6 enactments and state claims without a clear  
7 indication from Congress that that should be the  
8 effect of the FTC decree. So those are my thoughts  
9 about that issue.

10 The First Amendment issue, I know that's  
11 the second issue in the motion to dismiss, but it may  
12 be one of those issues that, until I clear out a lot  
13 of other underbrush, I may not be able to really  
14 analyze it well, because so much of, you know, what  
15 the First Amendment test relies upon in the  
16 commercial area, commercial speech area, is whether  
17 it's misleading or not. And so I guess I'll tip my  
18 hand a little bit by saying some of these claims do  
19 not strike me as misleading. So I'm not sure I  
20 necessarily need to reach a First Amendment issue.  
21 And so I might put that into a category of not  
22 needing to be decided earlier, rather than it needed  
23 to be decided later. So I may come back to that.

24 I guess I tend to think that in these  
25 commercial speech areas, while I'll probably spend



1 quite a few pages saying it, it really comes down to:  
2 If it's misleading, the state usually has a  
3 sufficient interest to prohibit misleading conduct.  
4 And if it's not misleading, then states typically  
5 don't have interest. I've never found the First  
6 Amendment analysis particularly enlightening in this  
7 area, but maybe I will need to study it more.

8 So that brings us, then, to the three  
9 misrepresentations that the plaintiffs are  
10 advocating. While I don't think the FTC consent  
11 order preempts the claims, statutory claims about  
12 that a reasonable consumer would not interpret the  
13 terms "natural" and "additive-free" to mean that the  
14 cigarettes are safer than other cigarettes, I do find  
15 all the FTC's analysis of it, with the warnings and  
16 with the additional warnings that the defendants have  
17 added to it, to be very persuasive. I just am having  
18 a hard time seeing how that is misleading. So that  
19 claim seems to me to be weak. Whether it's worthy of  
20 dismissal at this stage, I'll have to give it some  
21 thought. But I'm just not seeing that as misleading.

22 Skipping over to the second, I come to the  
23 one about the manufacturing processes. I guess I'm  
24 kind of coming out the same way. I know the FTC  
25 order doesn't have anything to do with that claim.

1 But I think, if you stare at a cigarette, you know it  
2 didn't grow on a tree. It somehow got into that form  
3 and shape. I don't know, it just doesn't seem to me  
4 that the term "natural" means that it's not subjected  
5 to some manufacturing process. So that one seems to  
6 me to be weak, too.

7 I do think, however, there are some legs to  
8 the "additive-free" and the menthol cigarettes. It  
9 seems to me that that's the one that is misleading --  
10 could be misleading. It would seem to me that  
11 perhaps, particularly the younger generation that's  
12 looking for natural products, additive-free, may --  
13 they might consider the addition of menthol not to be  
14 consistent with "additive-free." So that one seems  
15 to me to be the one that has legs.

16 Whether that particular statutory claim  
17 falls within the safe harbor for conduct that is  
18 permitted by federal law, I'll have to think about  
19 that. That's a little bit of a newer issue for me.  
20 It didn't seem to me the FTC consent decree dealt  
21 with that issue. So trying to extrapolate that the  
22 FTC permits that might be a bit harder. So I guess  
23 I'm thinking that one is weaving its way through to  
24 maybe survival.

25 The sort of intense analysis that you have

1 of some of the state unfair practices act claims, you  
2 know, that's a little bit further than I was able to  
3 sort of reach. So I don't have much in the way of  
4 comments on that.

5 But now, going back to the First Amendment  
6 analysis, it seems to me that that one might survive  
7 a First Amendment analysis and be able to go forward.  
8 The other two either fall because they're protected,  
9 or because they are just not misleading in the first  
10 place.

11 As far as the unjust enrichment claim, I  
12 need to give this much more thought, but my initial  
13 reaction is that it depends upon the relief that the  
14 plaintiffs are seeking. So much of these equitable  
15 claims, they tend to survive motions to dismiss,  
16 because if the plaintiffs are going to seek some sort  
17 of restitution or some sort of amount that comes from  
18 the profits of the defendants, then it seems to me  
19 that you may not be able to knock it out at this  
20 point. Obviously, if they're going to go on some  
21 misrepresentation claims, and say, Well, there is  
22 reliance, and here's the damages, and that sort of  
23 thing, then, if that's their theory, then they're  
24 going to be precluded, because there is a remedy at  
25 law. But it seems maybe difficult at this stage if

1 the plaintiffs are putting into their complaint that  
2 they're going to look at some unjust enrichment, that  
3 it's difficult to knock it out.

4 The other sort of common law claims,  
5 warranty, I'm afraid I'll just have to be enlightened  
6 a little about that; the prelitigation notices and  
7 privity, I don't have much sense. It looks to me  
8 like the injunctive relief -- I don't know, the  
9 defendants are saying it's moot. But I guess on this  
10 menthol one I'm not certain.

11 Trying to read Supreme Court opinions over  
12 the last two or three years on personal jurisdiction  
13 is a fun exercise, but I tend to think that RAI would  
14 probably not be subject to the jurisdiction here for  
15 the five plaintiffs that were parties to the suit in  
16 North Carolina. It looked to me like RAI is a  
17 specific -- if somebody was coming in and saying all  
18 of Reynolds was exempt from jurisdiction in New  
19 Mexico, that would probably be problematical. But  
20 RAI seems to be a particular corporation; it may well  
21 be protected from either specific or general  
22 jurisdiction in New Mexico. So I'm inclined to think  
23 that that one may be a good motion to dismiss, at  
24 least some of the plaintiffs, from bringing the  
25 claims here.

1 Well, I have probably talked enough. But  
2 at least you have some sense of what I thought after  
3 I had plowed through large amounts of the briefing  
4 and exhibits as well. I may not have a mastery of  
5 all the exhibits, just because of the volume here,  
6 but at least it gives you something to shoot at, what  
7 the judge is thinking after reading this material.

8 Mr. Biersteker, if you want to argue the  
9 motion to dismiss or your other motions, you're  
10 welcome to do so. But I'll let you kind of take  
11 over.

12 MR. BIERSTEKER: Thank you, Your Honor.

13 Just to give you a little roadmap maybe  
14 before we get into it: The motion to dismiss, as  
15 Your Honor just went through, presents maybe about  
16 seven different grounds for dismissal. And together,  
17 Mr. Schultz and I will address the Court today.  
18 Mr. Schultz will tackle two broad topics: The First  
19 Amendment and then a recurring issue that permeates,  
20 as I think Your Honor indicated in your preliminary  
21 remarks, a number of plaintiffs' legal issues,  
22 including the First Amendment issues, and that is  
23 whether the descriptors are inherently misleading,  
24 and whether the alleged misrepresentations it's even  
25 plausible to assert that a reasonable consumer would

1 be misled.

2 I'll address the remainder. Unless Your  
3 Honor has a different preference, what we propose to  
4 do is to first talk about preemption, then the First  
5 Amendment, which I think segues, in light of  
6 inherently misleading, right into the -- it's not --  
7 there is no plausible allegation here that anybody  
8 has been misled, no reasonable consumer would  
9 believe. Then I'll take up the remainder. And I  
10 propose to do it in this order. But I'm happy to do  
11 it in whatever order Your Honor wishes. The safe  
12 harbors and the other statutory defenses: Unjust  
13 enrichment, express warranty, RAI personal  
14 jurisdiction, and then mootness. Does Your Honor  
15 have a different preference?

16 THE COURT: No, those are fine. I'm  
17 wondering if you'd tolerate, after you get through  
18 with preemption, if I hear from the plaintiffs, and  
19 then you come back and respond, so I take these a  
20 little bit in bites.

21 MR. BIERSTEKER: That's fine. No objection  
22 to that whatsoever.

23 I guess, let's just start off with -- I  
24 think Your Honor laid out the law regarding  
25 preemption in Pueblo of Pojoaque -- did I do well?

1 Thank you. And I think they're preempted here  
2 because of the 2000 consent --

3 THE COURT: The only problem with Pueblo of  
4 Pojoaque is the Tenth Circuit didn't agree with my  
5 stay, so I may be bracing myself for reversal here.  
6 I don't know. I was proud of my preemption analysis.

7 MR. BIERSTEKER: I thought it was spot on.

8 But the issue, I guess, is whether there  
9 is -- as I heard Your Honor -- is whether or not  
10 consent decrees from the FTC can ever have preemptive  
11 effect. And I think the answer to that -- although  
12 certainly not binding on Your Honor, as you noted --  
13 needs to be "yes." I don't read Altria versus Good,  
14 which is the case that plaintiffs significantly rely  
15 upon for this proposition, to stand for the  
16 proposition that there that is a blanket rule that  
17 FTC consent decrees cannot have preemptive effect.

18 I don't know if Your Honor reads the case  
19 the same way plaintiffs do. But I think I read it  
20 just the opposite way. So let me start with that  
21 issue. The cases, both before and after the Supreme  
22 Court's 2008 decision in Good versus -- Altria versus  
23 Good, generally give preemptive effect to FTC consent  
24 orders. And we've got some cases in our brief.  
25 There is no case, post-Altria, Your Honor -- that we

1 could find anyway -- that refused to give preemptive  
2 effect to any FTC consent decree other than the  
3 specific decree that was at issue in Altria versus  
4 Good. Plaintiffs do not cite one, and again, we  
5 couldn't find one.

6 And, in fact, the government in Altria, in  
7 its amicus brief, began with the premise that consent  
8 orders generally can have preemptive effect, and  
9 argued only that the specific consent order in  
10 question in that case lacked preemptive effect for  
11 reasons that the Supreme Court basically adopted in  
12 its decision. In adopting the government's  
13 conclusions regarding this, the Supreme Court  
14 presumably would have said if it disagreed with the  
15 general principle that consent orders can have  
16 preemptive -- can preempt state law.

17 THE COURT: Well, that's one thing that I  
18 guess I pause on, just because the Supreme Court is  
19 so divided on preemption these days; that it's hard  
20 to infer everything from anything that they don't  
21 say. Your thoughts on that?

22 MR. BIERSTEKER: Well, I think what's  
23 telling is what they did say in the Altria decision,  
24 which is -- if the Supreme Court had intended to  
25 enunciate some sort of blanket rule that consent



1 decrees cannot be afforded preemptive effect,  
2 contrary to prior precedent, then it seems to me it  
3 would not need to have done what it did do. The  
4 Supreme Court identified a number of circumstances  
5 that suggested that the FTC cease and desist order,  
6 the 1971 cease and desist order that was at issue in  
7 Altria, was not intended to preempt claims being  
8 asserted against the Altria defendants in that case.  
9 And none of those circumstances obtain here. I think  
10 there are four. First, was that the Altria  
11 defendants were not bound by the 1971 consent decree  
12 that was at issue. Here, in contrast, Santa Fe is a  
13 party to, and bound by the FTC's 2000 decision and  
14 order.

15 Second, the government filed a brief saying  
16 that it did not intend the 1971 cease and desist  
17 order from the FTC to have preemptive effect. Of  
18 course, there is no such indication here by brief or  
19 otherwise.

20 Third, in the decades after the 1971 cease  
21 and desist order at issue in Altria was entered, the  
22 FTC was obviously clarifying its stance on the very  
23 issue that that original consent decree addressed.

24 So, for example, the FTC repeatedly brought  
25 enforcement actions against manufacturers for conduct

SANTA FE OFFICE  
119 East Marcy, Suite 110  
Santa Fe, NM 87501  
(505) 989-4949  
FAX (505) 843-9492



MAIN OFFICE  
201 Third NW, Suite 1630  
Albuquerque, NM 87102  
(505) 843-9494  
FAX (505) 843-9492  
1-800-669-9492  
e-mail: info@litsupport.com

1 that was within the four corners of, and complied  
2 with, the original 1971 consent decree. And they  
3 found it, nonetheless, misleading. And indeed the  
4 FTC also repeatedly questioned and reevaluated the  
5 methodology on which the 1971 cease and desist order  
6 in Altria relied. And in fact, by the time Altria  
7 was decided by the Supreme Court, the FTC had  
8 rescinded and abandoned its test method for measuring  
9 tar and nicotine yields in cigarette smoke. That was  
10 the foundation of the 1971 consent decree's exception  
11 to the general cease and desist order.

12 Here, in contrast, the course of conduct  
13 over the last 17 years since the 2000 decision and  
14 order were entered has been markedly different. The  
15 FTC and Santa Fe have abided by that decision and  
16 order without any disputes, and without any  
17 indication that the FTC questions the adequacy of the  
18 disclaimer as originally formulated.

19 To the contrary, the recent guidance  
20 letter, which is the subject of our third motion for  
21 judicial notice, from the FTC staff reaffirms at  
22 least the staff's continuing judgment that the  
23 disclaimer that, even plaintiffs allow the FTC  
24 blessed in the 2000 decision and order, is  
25 sufficient, even while the guidance letter allows

1 Santa Fe to modify the disclaimer slightly without  
2 fear of further enforcement action.

3 And finally -- and I think this is  
4 important, too -- there are significant differences  
5 in the text of the 2000 decision and order at issue  
6 here and the 1971 cease and desist order at issue in  
7 Altria versus Good. The 1971 order with respect to  
8 American Brands was written in purely injunctive  
9 terms. The introduction characterized it as, quote,  
10 "a consent order requiring a major cigarette  
11 manufacturer to cease advertising in a specified  
12 manner." And the key provision under Section 1,  
13 under the heading "Order," required the manufacturer  
14 to, quote, "Forthwith cease and desist from making  
15 the low tar representations unless the required test  
16 results were included."

17 The 2000 decision and order here, with  
18 respect to Santa Fe, does not include those or really  
19 any other injunctive terms. For example, there is no  
20 cease and desist language. And indeed, the 2000  
21 decision and order did two things: First, it states  
22 that Santa Fe shall display the disclosure in  
23 advertisements containing the relevant descriptors,  
24 without suggesting that Santa Fe was prohibited from  
25 using those words. And second, the order goes out of

SANTA FE OFFICE  
119 East Marcy, Suite 110  
Santa Fe, NM 87501  
(505) 989-4949  
FAX (505) 843-9492



MAIN OFFICE  
201 Third NW, Suite 1630  
Albuquerque, NM 87102  
(505) 843-9494  
FAX (505) 843-9492  
1-800-669-9492  
e-mail: info@litsupport.com

1 its way to make clear that Santa Fe is specifically  
2 permitted to keep using the challenged terms, stating  
3 "this provision shall not prohibit respondent from  
4 truthfully representing through the use of such  
5 phrases as no additives, no chemicals, additive-free,  
6 chemical-free, chemical additive-free, 100% tobacco,  
7 pure tobacco, or substantially similar terms that a  
8 tobacco product has no additives or chemicals, where  
9 such representation is accompanied by the disclosure  
10 mandated by this provision," close quote.

11 The 1971 consent order at issue in Altria  
12 didn't have any similar provision. And if the  
13 Supreme Court's language in the footnote in Altria  
14 versus Good attempting to draw a distinction between  
15 enjoining and authorizing means anything, it must  
16 mean that the differences in the language in the two  
17 consent orders -- the first, the one at issue in  
18 Altria, and the second one at issue here today --  
19 must matter.

20 It's a different proposition entirely, if  
21 Your Honor is of the view -- so let me back up a  
22 minute. So it's my view, then, that Altria versus  
23 Good did not enunciate a blanket rule. There would  
24 have been no need for the court to have gone through  
25 this analysis -- never mind that they didn't say

1 it -- but there would have been no need for them to  
2 go through this analysis and distinguish the issues  
3 that they saw with the 1971 cease and desist order  
4 that was at issue in Altria versus Good, if a more  
5 general rule would have applied.

6 And again, the precedent -- although not  
7 binding on Your Honor, you're correct -- does not --  
8 the precedent that we have reviewed in our briefs and  
9 that we have addressed shows that consent decrees,  
10 both before and after Altria versus Good, from the  
11 FTC are given preemptive effect. And I think that  
12 makes sense. I understand that there is some  
13 resistance to obstacle preemption, more so recently  
14 than there was historically. And I appreciate that.  
15 But it seems --

16 THE COURT: I mean, I guess I would  
17 describe it as almost on life support. Would you go  
18 that far?

19 MR. BIERSTEKER: I don't know that I would  
20 go that far. And I do think that if there is going  
21 to be any consent decree that gets accorded  
22 preemptive effect, it ought to be the 2000 decision  
23 and order here that specifically addressed the  
24 conduct, the very conduct that the plaintiffs here  
25 seek to challenge.

1 THE COURT: Why would you say that? Why  
2 would you say if we're going to breathe life into  
3 obstacle preemption, this would be the one to do it  
4 in?

5 MR. BIERSTEKER: Because the challenge is  
6 so clear and specific and direct with respect to  
7 language that the FTC specifically considered,  
8 specifically --

9 THE COURT: So you don't have to stretch  
10 this one, it's on point?

11 MR. BIERSTEKER: Yeah. I mean, look, let  
12 me put it this way: If you're looking for the text  
13 and how the text -- whether the text teaches there  
14 should be some preemptive effect here, I think the  
15 text of the 2000 decision and order, presupposing  
16 that such a consent decree could have preemptive  
17 effect under conflict obstacle preemption. If you  
18 accept that premise that it is possible, then I think  
19 this one, if you look at the text, intellectually  
20 leads to the conclusion that that is what is  
21 appropriate here.

22 THE COURT: Well, administrations come and  
23 go, and FTCs come and go. Let's say a current  
24 administration wanted to enter into very friendly  
25 consent decrees with corporations, and lower the

1 standards to something that is extremely low. And  
2 they're consent decrees, so they're, by nature,  
3 things that the corporation and the government are  
4 agreeing -- it's the flip side; it's not when  
5 government, the federal government is exercising its  
6 enforcement powers that concern me, as much as when  
7 it's laying down and just entering into consent  
8 decrees around the country with corporations, and  
9 then saying, "That's it. That's the floor and the  
10 ceiling."

11 MR. BIERSTEKER: And I appreciate the  
12 issue. But I think it would be ill-advised to view  
13 as a remedy, which I think would be far too blunt an  
14 instrument, to say: We're just not going to give  
15 preemptive effect to consent decrees ever.

16 THE COURT: Well, then what do you do? I  
17 mean, how do you pick consent decrees that you're  
18 going to say preempt state law, and then you have  
19 consent decrees that you say don't preempt? That  
20 seems to me to then put the federal court in a very  
21 unprincipled position. I pick which ones I like and  
22 which ones I don't like. And that doesn't seem to be  
23 a good way to --

24 MR. BIERSTEKER: No, I'm not suggesting  
25 that Your Honor or any other federal court should be

1 put in the position of choosing consent decrees that  
2 they like or dislike on their merits or on the  
3 substance.

4 But I do think, given the backdrop of the  
5 preemptive effect generally given to agency  
6 regulatory action, including adjudications, and then  
7 including consent decrees, that it's appropriate to  
8 look at them one by one, and to make a determination  
9 of whether or not the agency specifically considered,  
10 and specifically addressed the very conduct that is  
11 sought -- that the plaintiffs seek to challenge under  
12 state law.

13 THE COURT: All right. Anything else on  
14 the preemption issue?

15 MR. BIERSTEKER: Not unless Your Honor has  
16 questions, no.

17 THE COURT: I may in a moment. But let me  
18 see what Ms. Wolchansky says.

19 Mr. Biersteker, thank you very much. I  
20 appreciate it.

21 MR. REESE: Your Honor, again, good  
22 morning. Michael Reese on behalf of the plaintiffs.  
23 Ms. Wolchansky and I are actually taking different  
24 issues. I have been assigned the task of responding  
25 with respect to the preemption argument.



1 THE COURT: All right. Mr. Reese.

2 MR. REESE: Thank you, Your Honor.

3 As Your Honor recognized in the Pueblo of  
4 Pojoaque versus New Mexico case from 2016, you have  
5 to start with what is the standard. And we haven't  
6 talked about that yet. But when you look at what the  
7 standard is, especially in light of the recent  
8 Supreme Court decisions in the area of preemption,  
9 it's clear that this case is not preempted. So as  
10 Your Honor stated and held in the Pueblo of Pojoaque  
11 case, you have to begin your analysis with  
12 "assumption that the historic police powers of the  
13 States are not to be superseded by federal law unless  
14 that was the clear and manifest purpose of Congress."  
15 And there you were citing the Medtronics, Inc. versus  
16 Lohr case from the Supreme Court. And indeed, as  
17 Your Honor recognized in the Pueblo of Pojoaque case,  
18 the United States Supreme Court has recently held  
19 that -- and this is a direct quotation from the  
20 United States Supreme Court -- "In areas of  
21 traditional state regulation, the Court assumes that  
22 federal statute has not supplanted state law unless  
23 Congress has made such an intention clear and  
24 manifest." In that instance, Your Honor, in the  
25 Pueblo of Pojoaque case you were citing the Bates v.

SANTA FE OFFICE  
119 East Marcy, Suite 110  
Santa Fe, NM 87501  
(505) 989-4949  
FAX (505) 843-9492



MAIN OFFICE  
201 Third NW, Suite 1630  
Albuquerque, NM 87102  
(505) 843-9494  
FAX (505) 843-9492  
1-800-669-9492  
e-mail: info@litsupport.com

1 Dow Agrosciences, LLC case, at 554 U.S. 449.

2 And then, finally, as Your Honor  
3 recognized, the Supreme Court has also held that when  
4 there are two plausible interpretations of the  
5 statute, the Court has a duty to accept the reading  
6 that disfavors preemption. And again, that's Your  
7 Honor's case of Pueblo of Pojoaque citing the Bates  
8 v. Dow Agrosciences.

9 In the area of preemption there is three  
10 ways that clear manifest intent of Congress can be  
11 found: That's express preemption, there is field  
12 preemption, and there is conflict preemption. We're  
13 only dealing with conflict preemption. The only  
14 issue here is whether a 2000 consent order with the  
15 FTC preempts the entirety of this case. And that  
16 would only fall into the last bucket, which is  
17 conflict preemption. And it simply does not exist.

18 My learned counsel faulted us for not  
19 citing any cases since the Supreme Court's decision  
20 in Altria v. Good. We think a Supreme Court decision  
21 is enough. It's good enough. It's governing  
22 throughout this land. And if you look at the  
23 language of that case, it's clear. It's on all four  
24 points here, and said that the consent decree, such  
25 as in this case -- and in that case they cannot bind,

1 they cannot preempt. And what's important is: Let's  
2 start with the text, because the text is what is  
3 really important. What are we looking for? We're  
4 looking for a clear and manifest intent of Congress  
5 that these claims would be preempted. If that  
6 doesn't exist, it cannot be preempted under governing  
7 United States Supreme Court precedent.

8 So how does the FTC do what it does? It's  
9 based upon a law of Congress. And that law of  
10 Congress makes crystal clear -- it actually makes  
11 crystal clear that the manifest intent of Congress is  
12 not that these claims be preempted.

13 You go to 15 USC Section 57, Subsection B,  
14 and it states, "These remedies are provided in  
15 addition to, and not in lieu of, any other remedy or  
16 right of action provided by state or federal law."  
17 And in enacting this section of the FTC Act, this is  
18 what Congress stated: "It is not the intention that  
19 private rights of actions for redress based on the  
20 acts or practices which are the subject of a  
21 commission consumer redress action be barred by  
22 commission action."

23 So if you actually look at the text of the  
24 law that Congress passed it certainly doesn't support  
25 the defendant's position that there is a clear and

1 manifest intent. It actually shows the opposite.  
2 Now, we don't have to show the opposite. The burden  
3 is not on us. The burden is on the defendant to show  
4 that Congress had a clear and manifest intent. And  
5 that simply absolutely does not exist here.

6 Now, what's interesting about this language  
7 from the FTC Act that was cited by the First Circuit  
8 in the Altria -- which was the Good v. Altria case at  
9 that point in the history of the procedure of that  
10 case. And in that case, the Court found -- First  
11 Circuit found that those claims were not preempted.  
12 That's the same action that the Supreme Court, then,  
13 in 2008, ruled as a matter of governing law that  
14 these type of claims are not preempted. A consent  
15 decree, a consent order cannot preempt these type of  
16 claims. And it talks about how, if they want formal  
17 rule making, they can go through formal rule making.  
18 But they don't when they just enter into a  
19 settlement.

20 So based on just the text and the  
21 language -- the text of the FTC Act itself, based on  
22 governing Supreme Court law from the Good v. Altria  
23 matter -- which is all still good law today --  
24 defendants certainly have not met their burden and  
25 the claims are not preempted.

1 I'll just make one final point as well,  
2 Your Honor, unless you have any questions, because  
3 this issue is pretty simple, is that the FTC consent  
4 decree doesn't even apply to labeling. The text  
5 doesn't apply to labeling, and in fact, it couldn't  
6 govern labeling at the time, because of the  
7 regulatory structure. Now, many of the claims in  
8 this case are premised upon the alleged misleading  
9 and deceptive labeling of the products. So a consent  
10 decree that doesn't even touch upon that can't in any  
11 way preempt claims based upon the labeling.

12 Unless Your Honor has any questions on  
13 this, we think that the briefs speak for themselves,  
14 that the governing authority speaks for itself, and  
15 that it's clear that the burden, which is on the  
16 defendant, has certainly not been met here.

17 THE COURT: Well, you know, I'm a little  
18 bit in a pause of wondering if my views on preemption  
19 have been too hostile to federal preemption -- if  
20 I've got too much Clarence Thomas in me to -- so  
21 after the Tenth Circuit extended the stay in  
22 Pojoaque. What's your thoughts? Do you think maybe  
23 I am not receptive enough to federal preemption?

24 MR. REESE: No, Your Honor. I think we do  
25 think Pojoaque is correctly decided. But even if the

1 Pojoaque case had never been filed in the first  
2 place, Your Honor's decision is based upon quotation  
3 after quotation after direct quotation of governing  
4 Supreme Court law. What has happened in the last  
5 decade, or last 10 years, so going into the last --  
6 2008, 2009, as well -- is the Supreme Court has  
7 solidified the law on preemption and made it crystal  
8 clear that these type of claims are not preempted.  
9 So Pojoaque is not an outlier. Pojoaque is just  
10 relying on sound authority from the United States  
11 Supreme Court.

12 THE COURT: Well, the defendant's position  
13 is that I would be the first one to say that these  
14 FTC consent decrees do not have preemptive effect;  
15 that you can't find a case that says that. And I  
16 know you're drawing it from the Supreme Court's case.  
17 But since then no one has drawn that. Thoughts on  
18 that?

19 MR. REESE: Just go back to my opening  
20 remarks is that, if it's a Supreme Court case --

21 THE COURT: You like the Supreme Court  
22 case.

23 MR. REESE: -- that is good enough. It's  
24 governing authority. And we do read the Supreme  
25 Court decision, the Supreme Court decision, Altria v.

1 Good, does say that these type of consent decrees  
2 cannot have preemptive effect.

3 THE COURT: Is there a category or kind of  
4 consent decree that you think would have preemptive  
5 effect? Mr. Biersteker seemed to think that there  
6 might be categories that would not, and so his is a  
7 more moderate position. Is yours also there? And if  
8 so, which ones have preemptive effect and which ones  
9 don't?

10 MR. REESE: Many of the cases in which the  
11 defendant cites do not involve FTC consent decrees.  
12 And certainly, each regulatory body has a different  
13 statutory authority. So when you look at the  
14 statutory authority for the FTC -- and this is  
15 discussed in detail in the First Circuit's decision  
16 in the Good v. Altria case, and it goes through a  
17 detailed analysis of the FTC Act. That shows that  
18 because of the way the FTC is set up, and that these  
19 consent decrees come down, they are expecting  
20 parallel actions. And again, I'll go back to the law  
21 itself that gives the FTC the ability and the  
22 authority to do this. It states, "Remedies provided  
23 in this section are in addition to, and not in lieu  
24 of, any other remedy or right of action provided by  
25 state or federal law." That's, again, 15 USC Section

1 57. And Congress stated that that's not the  
2 intention that the FTC Act private rights of action  
3 be subject to being barred or precluded in any way.

4 So maybe consent decrees with other  
5 regulatory agencies, the EPA, Health and Human  
6 Services, I'm not sure what their statutory authority  
7 is. But with the FTC it's crystal clear based upon  
8 the act itself that they are not to -- FTC consent  
9 decrees are not supposed to preclude other  
10 litigation. In fact, the way that the FTC works and  
11 consumers are protected is by having parallel actions  
12 brought by private litigants or brought by AGs of the  
13 state governments.

14 THE COURT: All right. Anything else on  
15 preemption, Mr. Reese?

16 MR. REESE: No, Your Honor.

17 THE COURT: Thank you, Mr. Reese.

18 MR. REESE: Thank you.

19 THE COURT: Mr. Biersteker, I'll give you  
20 the last word on preemption.

21 MR. BIERSTEKER: Thank you, Your Honor,  
22 just briefly.

23 To the extent that plaintiffs are taking  
24 the position that, while maybe consent decrees can  
25 have preemptive effect, but not FTC consent decrees



1 because of the FTC Act, I think their argument is off  
2 the mark. They're relying upon Section 57(b)(E) of  
3 the act. And the language they quote that an action  
4 there for a violation of a federal rule or cease or  
5 desist order, that's what that section governs -- and  
6 it has that language that they remark upon -- in  
7 addition to any other remedy or right of action  
8 provided by state or federal law, that it doesn't  
9 preempt.

10 But that's a different section of the  
11 statute than the section under which the consent  
12 decree here was issued. The consent decree here was  
13 issued under a different section, Section 45(b).  
14 That does not have a similar savings provision. And,  
15 of course, they talk about Altria v. Good. And  
16 Altria v. Good in the First Circuit addressed the  
17 specific argument that plaintiffs are making here,  
18 saying that they did not think it was a stretch. But  
19 no other court has adopted that rewrite of the  
20 statute. And indeed, when the U.S. Supreme Court  
21 reviewed Altria v. Good, it didn't even cite section  
22 57(b) for that portion of the First Circuit's  
23 decision.

24 And neither plaintiffs here, nor the First  
25 Circuit, make any attempt to reconcile their argument

1 with the statutory text and the well-settled rule of  
2 statutory construction that, when Congress includes  
3 language in one section of a statute, but not  
4 another, courts will presume that Congress intended a  
5 different reading. So I think that the FTC Act does  
6 not indicate -- in fact, arguably to the contrary --  
7 that FTC consent orders, such as the one before Your  
8 Honor here under 45(b), cannot have preemptive  
9 effect.

10 And again, the cases that we cited in our  
11 briefs about giving preemptive effect to consent  
12 decrees from the FTC, both before and after the  
13 Altria ruling, as well as recent decisions giving  
14 preemptive effect to other agencies' consent  
15 decrees -- for example, the EPA -- all, again,  
16 post-Altria -- argue against the blanket rule that  
17 they're asserting.

18 And then, just briefly, if I may, Your  
19 Honor, plaintiffs talked about the packs. And I  
20 wanted to briefly address that. It's a scope issue.  
21 It's not whether there is preemptive effect, but  
22 whether or not the scope of preemption would reach  
23 the packs in addition to the ads. And they say it  
24 cannot. They make that argument, even though the FTC  
25 chose not to require any disclaimer on the packs, and

1     that Santa Fe Tobacco, the defendant -- one of the  
2     defendants here -- nonetheless, put the exact same  
3     disclaimer on the packs voluntarily.

4             And to be sure, plaintiffs have quibbled  
5     with the font size used on the packaging. But given  
6     that the font requirements are only for ads, and do  
7     not apply to the packs, this is not an instance of  
8     noncompliance with the consent order, which I think  
9     would have a different implication. And I think it's  
10    just a nod to inherent space limitations on the pack.

11            And, in addition, at the end of the day, I  
12    think there just can be no question that a consumer  
13    who looked at one side of the pack and saw the  
14    Surgeon General's warning, the placement and other  
15    aspects of which are adequate as a matter of law  
16    under the Federal Cigarette Advertising and Labeling  
17    Act to inform consumers about the health risks of  
18    smoking, so, too, would that consumer have looked at  
19    the opposite side of the pack, see the disclaimer  
20    that has the language that the FTC determined in the  
21    2000 consent decree and order were adequate to  
22    disclaim any implied suggestion that additive-free  
23    tobacco somehow makes Natural American Spirit  
24    cigarettes safer.

25            By using that same language, I would submit

SANTA FE OFFICE  
119 East Marcy, Suite 110  
Santa Fe, NM 87501  
(505) 989-4949  
FAX (505) 843-9492



MAIN OFFICE  
201 Third NW, Suite 1630  
Albuquerque, NM 87102  
(505) 843-9494  
FAX (505) 843-9492  
1-800-669-9492  
e-mail: info@litsupport.com

1     that Santa Fe brought the packs within the ambit of  
2     the consent decree as well. Again, it's a scope  
3     issue, it's not a threshold issue of whether there  
4     can be preemption.

5             Anything further you would like to hear  
6     from me, Judge?

7             THE COURT: Not on preemption. Thank you,  
8     Mr. Biersteker.

9             Well, I'm going to probably start the  
10    opinion with -- at least writing it toward a  
11    nonpreemption. I'll certainly read and study more,  
12    and particularly these more recent cases. But I'm  
13    inclined to at least stick with -- my initial  
14    inclination is that the consent decree here does  
15    not -- federal preemption does not knock out the  
16    state claims. So that all the other six issues we  
17    have to address here, we're probably going to have to  
18    grapple with. But I'll certainly try to get you  
19    something on that as soon as possible.

20            All right. Mr. Schultz, are you going to  
21    take up the First Amendment issue next?

22            MR. SCHULTZ: Let me ask the Court's  
23    preference. When you were going through your initial  
24    inclinations, you got to the First Amendment, but  
25    then you put that to the side. So I don't know if

1 that's an indication that you'd rather hear about the  
2 reasonable consumer issues first, and then the First  
3 Amendment? Whichever --

4 THE COURT: No, it's really up to you. I  
5 guess I'm having a little trouble maybe -- it seems  
6 to me, if I don't have to reach these First Amendment  
7 issues -- as can you tell, I don't avoid many issues,  
8 so I may reach them anyway -- but I'm wondering if I  
9 need to address them until I go through the three  
10 theories. But if you want -- I know you and Mr.  
11 Biersteker got two of these arguments that would  
12 knock out everything upfront. And I understand  
13 certainly the preemption issue. With the First  
14 Amendment, though, it's hard for me to analyze it  
15 without getting into the specific claims, because of  
16 the inherently misleading prong on these. But you  
17 take it the way you want to go.

18 MR. SCHULTZ: Your Honor, how about if I  
19 propose this: Let me start with the reasonable  
20 consumer argument about those three claims. And in  
21 particular, given the Court's concern, let me start  
22 with the menthol issue. It's not in the order that  
23 they're presented, but let me start with that issue.  
24 And then, when I'm done with that, if the Court would  
25 like, I can move into the First Amendment, or if you

1 want me to break and allow the plaintiffs to respond  
2 on that issue, we can go that way.

3 THE COURT: All right. I probably will ask  
4 you to break, if we're going to go to this one.  
5 Because, as you can tell, it's the one that is  
6 troubling me at the moment.

7 MR. SCHULTZ: Your Honor, that's fine.

8 So what we're really talking about are 14  
9 of the 19 plaintiffs' statutory claims. All of these  
10 claims are based on a reasonable consumer standard.  
11 And we list what all those claims are in the brief.  
12 What this requires, Your Honor, is for the plaintiffs  
13 to be able to plausibly allege that the statements at  
14 issue would mislead a reasonable consumer. And if  
15 they can't make that plausible allegation, then the  
16 plaintiffs have failed to state a claim.

17 The plaintiffs' basic response is very  
18 similar to what they say with response to their First  
19 Amendment argument. And it's a narrowly simple  
20 syllogism, which is: We have pled, and we have used  
21 the words that the statements at issue are either  
22 inherently misleading or are deceptive. This is a  
23 motion to dismiss. You must accept that allegation  
24 as true. Therefore, the statements would mislead a  
25 reasonable consumer. It's a simple syllogism. The

1 problem is it's just wrong. You don't have to accept  
2 the fact that they have alleged this over and over  
3 again.

4 The question of whether the allegations are  
5 sufficient is actually a question of law. It's not a  
6 question of fact. And it's a question that this  
7 Court can decide based on the allegations put forward  
8 in the complaint.

9 THE COURT: I tend to agree with that.

10 MR. SCHULTZ: And more specifically, Your  
11 Honor, it's not a question of whether there is some  
12 hypothetical consumer out there who may be misled.  
13 Reasonable consumer -- I think the language from the  
14 Ninth Circuit, Judge Nelson's opinion in Davis versus  
15 HSC Bank Nevada, the plaintiffs have to show that the  
16 ordinary consumer, acting reasonably under the  
17 circumstances is likely to be deceived. And that's  
18 where the plaintiffs have failed. So, Your Honor,  
19 let me start with the menthol issue, because that was  
20 the one that seemed to give the Court some pause out  
21 of the three issues.

22 THE COURT: And I guess to be more  
23 specific, I don't think it's the word "natural" there  
24 as much as the word "additive-free" that seems to me  
25 to be the potentially misleading phrase.

1 MR. SCHULTZ: Understood, Your Honor.

2 Let me start, though, with talking about  
3 what the situation would be if the plaintiffs -- what  
4 about if the plaintiffs would have alleged that  
5 defendant's menthol cigarettes, cigarettes that said  
6 they were menthol-flavored, did not contain any  
7 menthol at all? Well, clearly, Your Honor, they  
8 would have a claim for deception. They would say:  
9 You told us there was menthol, and yet, when we  
10 bought these cigarettes, there was no menthol.

11 But here, Your Honor, what the plaintiffs  
12 are claiming is that a reasonable consumer who  
13 purchased a menthol cigarette -- and as the  
14 plaintiffs made clear in their complaint, there is a  
15 universe of Santa Fe tobaccos they could purchase.  
16 They're shown in full color in their complaint. They  
17 could pick any one of these flavors. We have  
18 consumers who specifically are picking menthol  
19 cigarettes. And yet what they're really saying is  
20 that a reasonable consumer who purchased the menthol  
21 cigarettes, and the fact that the pack clearly states  
22 that they are menthol, and that the ingredients  
23 include menthol, somehow they were deceived.

24 That's just not plausible, Your Honor.

25 They can't establish that a reasonable consumer who

SANTA FE OFFICE  
119 East Marcy, Suite 110  
Santa Fe, NM 87501  
(505) 989-4949  
FAX (505) 843-9492



MAIN OFFICE  
201 Third NW, Suite 1630  
Albuquerque, NM 87102  
(505) 843-9494  
FAX (505) 843-9492  
1-800-669-9492  
e-mail: info@litsupport.com



1 chose to pick a menthol-flavored cigarette, and where  
2 it was clearly disclosed that the ingredients were  
3 tobacco and menthol -- that's stated right on the  
4 pack -- that somehow they were under the belief that  
5 these cigarettes wouldn't contain menthol, or that  
6 they wouldn't be menthol-flavored.

7 And, Your Honor, let's be very, very  
8 specific about exactly what it is the plaintiffs  
9 alleged, as compared to what they're arguing now.  
10 All of this comes down to two paragraphs in the  
11 complaint, Your Honor. First, start at paragraph 67.  
12 What the plaintiffs said there is, quote, "Contrary  
13 to the explicit claim on every label that Natural  
14 American Spirit cigarettes contain additive-free  
15 natural tobacco, defendants add additives to Natural  
16 American Spirit menthol cigarettes." They don't  
17 allege that we add menthol to the tobacco -- their  
18 words. "Defendants add additives to Natural American  
19 Spirit menthol cigarettes.

20 And the very next paragraph, paragraph 68:  
21 "Defendants place menthol in the cigarette filter."  
22 That's the allegation.

23 So, Your Honor, here, the only way that  
24 plaintiffs could succeed in their claim is that they  
25 would have to show that, although a cigarette that

1 claims to be a menthol cigarette must contain  
2 menthol, but somehow that menthol cannot in any way,  
3 shape, or form touch the tobacco. That's not a  
4 plausible allegation, Your Honor.

5 THE COURT: Well, I'm trying to look for a  
6 bit of an analogy here. But if Coke put on its  
7 product: "There is no sugar here in our Coke," and  
8 then on the back side listed out sugar as an  
9 ingredient, and then, would you, in that situation,  
10 they cancel each other out, say that no reasonable  
11 consumer would ever think that Coke does not have  
12 sugar? That still would trouble me, from a labeling,  
13 or from an advertising standpoint, that we just say,  
14 well, there is enough on there, they should figure it  
15 out.

16 MR. SCHULTZ: Your Honor, the difference  
17 though, is here, again, look at exactly what the  
18 defendants state. The defendants state that they are  
19 using 100% additive-free tobacco. And then on the  
20 back of the carton it states the ingredients are  
21 organic tobacco and menthol. And the pack is labeled  
22 "menthol-flavored." There is no deception for a  
23 consumer who chooses a menthol cigarette. They know  
24 they are getting a cigarette that is  
25 menthol-flavored.

1 THE COURT: Why not, on just the menthol  
2 cigarettes, don't they eliminate this additive-free,  
3 though, statement? I mean, if they've got products  
4 in which they don't add anything to it, why don't  
5 they on the menthol cigarette just drop that?

6 MR. SCHULTZ: Probably, Your Honor --  
7 again, let's be very clear -- the statement is 100%  
8 additive-free tobacco. The tobacco is not --

9 THE COURT: But the menthol gets into the  
10 tobacco at the delivery of the product stage, right?  
11 I mean, it may not be touching the tobacco when  
12 they're selling it. But for the consumer, the  
13 menthol is part of the tobacco, right?

14 MR. SCHULTZ: Actually, I'm going to  
15 disagree, Your Honor. The menthol is part of the  
16 cigarette. It is not part of the tobacco. And there  
17 is no allegation that we have in any way artificially  
18 flavored the tobacco.

19 THE COURT: I guess, just in the use, when  
20 the product is used, the menthol is part of and  
21 touches the tobacco.

22 MR. SCHULTZ: Through the delivery system,  
23 that is true, and that's inevitable, and the  
24 plaintiffs allege that it is inevitable. So, Your  
25 Honor, it begs the question. How then -- number one,

1     how then is a menthol-flavored cigarette going to be  
2     provided when menthol is not included? And where is  
3     the deception to a reasonable consumer who knows they  
4     are buying a menthol cigarette, and they turn the  
5     package over, and under ingredients it clearly states  
6     "organic tobacco and menthol," which is 100% correct.  
7     Where is the deception? How can a person who is a  
8     reasonable consumer honestly claim that they had no  
9     idea that they were going to be opening a pack and  
10    smoking a menthol-flavored cigarette?

11           I mean, Your Honor, we provided the Court  
12    with some cases. For example, the Thomas versus  
13    Costco Wholesale case. That was a claim where the  
14    consumer was challenging the use of the word  
15    evaporated cane juice for chocolate milk. And the  
16    court said there was no deception, it was not  
17    mislabeled, because a reasonable consumer could not  
18    plausibly believe that there was no added sugar for  
19    something that was called chocolate milk.

20           And, similarly, Your Honor, the Ang versus  
21    WhiteWave Foods; that was a consumer fraud claim that  
22    was dismissed. That had to deal with the claims for  
23    soy milk and almond milk. And the consumer there  
24    claimed that they were misled because they honestly  
25    believed that came from a cow, because it was labeled

1 "milk." The Court said that could not be a  
2 reasonable consumer viewing that.

3 Your Honor, we feel the same is here for  
4 menthol. What is listed on the pack for the menthol  
5 cigarettes, 100% additive-free tobacco and menthol.  
6 That is precisely what is provided. That is  
7 precisely what is delivered. And it is precisely  
8 what the consumer expects when he or she chooses a  
9 pack of menthol-flavored cigarettes.

10 Your Honor, I can turn to the other two  
11 claims, or I can break here.

12 THE COURT: Let's break here, because this  
13 is one of the things I'm most troubled by. So let's  
14 focus on it a little bit. Anything else,  
15 Mr. Schultz?

16 MR. SCHULTZ: Not on that claim, Your  
17 Honor.

18 THE COURT: Thank you, Mr. Schultz.

19 Ms. Wolchansky, are you going to tackle  
20 this one?

21 MS. WOLCHANSKY: I am. And I have some  
22 visual aids for the Court. I'll just bring it up.

23 THE COURT: All right.

24 I know you didn't want to enter an  
25 appearance, Mr. Koluncich, but good morning to you.

1 MR. KOLUNCICH: Good morning, Your Honor,  
2 plaintiffs' team, defense counsel. Good to see you  
3 all.

4 THE COURT: Let me ask Mr. Schultz before  
5 we look at the visuals here. The statement that you  
6 have in your brief: "Obviously consumers are not  
7 misled by a product's inclusion of an ingredient that  
8 serves as one of its primary distinguishing and  
9 desired characteristics." It just seems to me that  
10 may sweep too broadly. I may not be thinking on my  
11 feet of examples where you have somebody saying one  
12 thing, but then saying something untrue about the  
13 product. It just seems to me that shouldn't take it  
14 out of the misleading characteristic. Your thoughts  
15 about that? I mean, to write that as an opinion  
16 would trouble me.

17 MR. SCHULTZ: Well, and Your Honor, we  
18 wouldn't be hurt in the least if you didn't quote our  
19 brief hook, line, and sinker.

20 But it still begs the question. The  
21 allegation in the complaint is that menthol was added  
22 to the cigarette. There is no allegation that we  
23 added menthol to the tobacco. And the plaintiffs are  
24 even more explicit that menthol is added to the  
25 filter. There is no question that Santa Fe is

1 permitted to provide a menthol-flavored cigarette.  
2 And given that menthol tobacco is not a natural  
3 product, somehow the menthol has to be incorporated  
4 into the delivery system. Santa Fe chose to do that  
5 by not altering the tobacco, but by adding it to a  
6 filter.

7 As a result, again, Your Honor, the  
8 ingredients listed on the back of the pack are  
9 precisely correct: "Organic tobacco and menthol."

10 So I'm not going to disagree with Your  
11 Honor about, perhaps, some of the adjectives used in  
12 our brief being too broad. But the fundamental point  
13 doesn't change, Your Honor. And we would stand by  
14 that as a reason why no reasonable consumer could  
15 find, that when they purchase that pack, they weren't  
16 getting exactly what they thought they were buying.

17 THE COURT: All right. Thank you,  
18 Mr. Schultz.

19 Ms. Wolchansky.

20 MS. WOLCHANSKY: Your Honor, if I might  
21 just approach.

22 THE COURT: You may.

23 MS. WOLCHANSKY: We are talking about this  
24 box. We have an entire rainbow collection over  
25 there. This is a menthol pack.

1 THE COURT: All right.

2 MS. WOLCHANSKY: So if I might just pass  
3 this up to the Court.

4 THE COURT: You may.

5 MS. WOLCHANSKY: I will try to do this in a  
6 bit of a vacuum since we are dealing right now with  
7 the menthol issue.

8 But it is important when we're talking  
9 about these reasonable consumer issues -- and nobody  
10 here today has yet talked about the facts -- but this  
11 is not a evaporated cane juice; it's not soy milk.  
12 These are cigarettes. It is tobacco. It is an  
13 addiction. It is a drug. And it is important to  
14 give ourselves a little bit of a backdrop here before  
15 we jump into the law and talk about why this is  
16 inappropriate on a motion to dismiss.

17 So, again, just to revisit the burden on a  
18 motion to dismiss, because it is really important,  
19 especially with respect to these reasonable consumer  
20 issues, we are today to take all of the allegations  
21 in the complaint -- and they are plentiful -- as  
22 true. And many of the cases that the defendants cite  
23 today are mere -- very simple determinations made by  
24 the Court.

25 Let's look at an evaporated cane juice



1 label. Is that misleading? Can the court decide  
2 that? No outside evidence; we don't have regulatory  
3 agencies, nonprofits, government bodies, courts  
4 weighing in on whether or not the actual labeling is  
5 deceptive.

6 Here, we have all of that. And we should  
7 not ignore the allegations in the complaint. And all  
8 we're looking at here is whether a reasonable  
9 inference can be drawn that the defendant could be  
10 liable for the misconduct alleged. And the  
11 complaint, which is full of factual allegations  
12 regarding the alleged deception here, cannot be  
13 ignored.

14 We also have 12 plaintiffs, all of whom  
15 purchased Natural American Spirit cigarettes because  
16 they believed that they were safer and healthier. We  
17 have that in the complaint. That can't be ignored  
18 either.

19 We also have many more clients and  
20 plaintiffs, should this case proceed, that may be  
21 entered into this case as well.

22 So, again, let's talk really quickly about  
23 the history here so that we know what we're dealing  
24 with. This is a drug addiction. It's not a choice.  
25 It's not a food. These are cigarettes. Reynolds, a

1 pioneer in the tobacco industry, sought to sell  
2 cigarettes promoting a safer and healthier option.  
3 This has been over the course of many, many, many  
4 years, back to the '30s and '40s.

5 First, we had filters. Then we had low  
6 tar. We had lights. And now we have natural,  
7 Additive-free. These are very, very important  
8 indicators on the front of every pack, at every  
9 purchase, that are meant to deceive consumers into  
10 believing that this is a safer or healthier option.

11 And Your Honor doesn't have to believe me  
12 or Mr. Schultz. We have plenty of scientific  
13 evidence: Testing; we have the FDA. The most recent  
14 letter that was filed with the Court for judicial  
15 notice with the FTC stating that this could be  
16 misleading to reasonable consumers. The FDA warning  
17 letter. I will go through all of these allegations  
18 in the complaint to talk about why, in fact, these  
19 natural, additive-free and organic representations,  
20 taken in context of the pretty packaging that we have  
21 here is, in fact, deceptive.

22 So let's talk first about the label. I  
23 handed the Court a pack for your viewing. But the  
24 complaint specifically alleges in paragraph 40 that  
25 they sell these cigarettes as "natural" and "100%

1 additive-free." It's right on the front. "Natural"  
2 is one of the largest representations on the front of  
3 package. And right on the bottom it says, "100%  
4 additive-free natural tobacco."

5 We'll talk in a minute why the distinction  
6 that Mr. Schultz made between the tobacco and the  
7 cigarette is just a nonissue, because consumers --  
8 which, when we get to discovery, which we should in  
9 this case -- we will learn that the difference  
10 between tobacco and cigarettes to a consumer  
11 purchasing these products, they are interchangeable,  
12 it does not matter.

13 So we have the "natural" representation,  
14 the "100% additive-free" representation. And all of  
15 these are intertwined with the Native American on the  
16 front smoking the pipe. We have the eagle, the  
17 representations all over the advertisements about the  
18 earth, and U.S. grown tobacco, all feel-good visual  
19 noise. All of this is meant to distract from what  
20 they claim -- and the focus in this case is on the  
21 disclaimer -- or here in this case the menthol that  
22 might be listed very, very small, as Your Honor can  
23 see on the pack that I handed you, very, very small  
24 that it says "menthol."

25 Well, we have lots of case law that is a

1 very clear that you cannot put something on the front  
2 that it's 100% additive-free, and force the consumer  
3 to turn around and say, Hum, well, it says menthol on  
4 the back. Is that natural menthol? Is that grown in  
5 the field? Or is it added to the cigarette? Is it  
6 added to the filter? Is it added in some way to the  
7 cigarette that makes it not additive-free?

8 Again, this entire labeling and marketing  
9 scheme is meant to reassure the consumer that it is,  
10 in fact, healthier and safer. So with respect to the  
11 menthol, specifically, we might have an ingredient  
12 listed on the back that says "menthol." Mr. Schultz  
13 argued that menthol is -- they're buying it because  
14 it's menthol. Well, why don't we take  
15 "additive-free" off, as Court suggested?

16 In the complaint we don't simply state that  
17 the cigarettes contain menthol. In paragraph 68 the  
18 complaint states, "Defendants placed menthol in the  
19 cigarette filters. Because menthol is highly  
20 volatile, it migrates into the tobacco and throughout  
21 the cigarette providing a menthol flavor. As the FDA  
22 has noted, menthol diffuses throughout the cigarette  
23 irrespective of where it was applied. This makes the  
24 additive-free claim literally false."

25 So, again, if all cigarettes --

1 THE COURT: What did you just read?

2 MS. WOLCHANSKY: Paragraph 68 of the  
3 complaint.

4 69 addresses menthol as well. And it  
5 states that "menthol contaminates everything in a  
6 pack." No menthol is applied to their filter.  
7 Instead, they apply menthol to their brand --

8 THE COURT: It wouldn't contaminate it  
9 until someone starts smoking it, right? I mean, you  
10 don't really contaminate a pack. You contaminate the  
11 tobacco once you light it up; correct?

12 MS. WOLCHANSKY: So the menthol is in the  
13 cigarette. And, arguably, as paragraph 69 of the  
14 complaint states, "Menthol is applied to the paper  
15 side of the foil, and allowed to equilibrate in the  
16 pack." So the argument or the complaint states that  
17 it can contaminate the entire pack.

18 But to Your Honor's point earlier, assuming  
19 that that's true, who cares if it's only in the  
20 cigarette as it sits in the pack? The point is: How  
21 is it delivered into your lungs? When a cigarette is  
22 ignited and it is lit, the menthol, the tobacco, the  
23 chemicals, everything in that cigarette goes into  
24 your mouth and into your lungs. So the menthol is  
25 mixed with the tobacco. So it is disingenuous to

1 suggest that because the tobacco, which as it may sit  
2 in its manufactured state doesn't contain menthol, it  
3 contains the menthol the minute that you light that  
4 cigarette. So it is not, in fact, additive-free.

5 And to suggest, Well, we say that it has  
6 menthol on the back, so that doesn't make the 100%  
7 additive-free claim literally false, is just as  
8 disingenuous as they claim our allegation is, which  
9 is why this is inappropriate on a motion to dismiss.

10 Reasonable consumers, what is that  
11 standard? The reason why all of the case law that we  
12 have cited in our brief states that this is a jury  
13 question, is because there is a reason why those  
14 packs say "100% additive-free." There is a reason  
15 why they say "natural." These are very important  
16 indicators. They are reassurances for the consumer.  
17 They are the reason why Natural American Spirit  
18 cigarettes are 100 percent on the incline in sales,  
19 when all other cigarette brands are 20 percent down.

20 THE COURT: Educate me a little bit about  
21 menthol. What is menthol?

22 MS. WOLCHANSKY: We have a tobacco expert  
23 in the courtroom.

24 MR. SCHLESINGER: May I address that,  
25 Judge?

1 THE COURT: You may.

2 MR. SCHLESINGER: Scott Schlesinger for the  
3 plaintiff.

4 I've looked over the remarks I made some  
5 time ago when I visited with Your Honor. And I  
6 remember showing you a menthol pack. And I remember  
7 it got your attention back then, what Mr. Monte said  
8 was: There was an appropriate distinction to draw,  
9 the menthol is in the filter, not in the tobacco.

10 The FDA, the FTC, the Tobacco Act all  
11 define a cigarette as any tobacco product. So it's a  
12 distinction without a difference.

13 And here's what menthol is. Menthol is an  
14 extraordinary important ingredient, additive,  
15 chemical additive, with major physiological effects  
16 that's the important part of cigarette sales. As a  
17 matter of fact, 99 percent of every single U.S.  
18 cigarette on the market contains menthol to some  
19 degree. However, 1/3 of every cigarette on the  
20 market in the United States contains enough menthol  
21 for the consumer to be aware of it, and what's called  
22 a characterizing flavor, and it's thus, identified  
23 and advertised that way.

24 But if you look at the ingredients, now  
25 required to be disclosed on all tobacco products,

1 almost all cigarettes contain menthol. Why? Menthol  
2 was first put in cigarettes in the '30s and '40s,  
3 back when they had Kool, and things like that, as a  
4 way for people to smoke when they were sick.

5 But it was discovered to have a synergistic  
6 effect on the addictive nature of the cigarette. And  
7 we cite in paragraph -- as Footnote 21 on page 31 of  
8 our complaint, the physiological effects of menthol  
9 cigarettes from the FDA. The FDA has a major report  
10 out. The Tobacco Act contains an obligation that  
11 Congress put on the FDA, to let -- the FDA had, under  
12 the act, determined that menthol should be removed  
13 from all cigarettes within one year of the Tobacco  
14 Act coming in, in 2009.

15 The determination has been -- and this is  
16 unrefuted evidentially -- I mean, there is literally  
17 thousands of peer-reviewed scientific studies --  
18 menthol eases inhalation. It acts as an anesthetic.  
19 It allows the first dose of menthol -- of nicotine to  
20 get to the brain by making a child, who -- all  
21 cigarette smoking begins in pediatrics, in  
22 adolescence -- it's a pediatric disease. Addiction  
23 is considered a pediatric disease. The menthol numbs  
24 the throat, so the first dose of cigarette smoke can  
25 get down a person's throat. A kid, or a 16-year-old



1     who smokes, chokes, or gets dizzy, or throws up.  
2     It's very hard. It's harsh. Which is why a lot of  
3     this is designed up the sugars, lower the pH, make it  
4     inhalable. Menthol helps that. It numbs the throat.  
5     Gets the smoke into the lungs. It has no taste buds,  
6     and allows for rapid and one hundred percent perfect  
7     transference of nicotine in to the alveolar capillary  
8     beds, shooting nicotine to the brain seven seconds  
9     faster than IV.

10           The FDA has determined through its Tobacco  
11     Product Scientific Advisory Committee, as well as the  
12     FDA itself, in monster extensive reports that menthol  
13     causes youth initiation, eases and makes it quicker  
14     for people to become addicted, and makes it harder to  
15     get off cigarettes. And that they are a public  
16     health problem that makes cigarettes more deadly,  
17     more dangerous.

18           So that's -- menthol is a critically  
19     important component for -- one-third of all  
20     cigarettes in the United States are menthol  
21     characterized in flavor. It's a very important  
22     chemical.

23           And, for instance, when Reynolds recently  
24     bought Lorillard, two years ago -- the oldest tobacco  
25     company in the United States, Lorillard Tobacco, from

1 the 1700s -- they purchased it solely to get Newport  
2 menthol cigarettes, the number 1 selling menthol  
3 brand in the country, 50 percent of the menthol  
4 market. And they moved -- through doubling the sales  
5 force, they moved Newport into second place overall  
6 selling cigarette behind Marlboro, even above their  
7 Camels.

8 Now, this cigarette, Natural American  
9 Spirit, which Judge Kessler has adjudicated the term  
10 "natural" is unlawful. In her adjudicated findings,  
11 her corrective statements, her injunctive relief, she  
12 restricted the right to award money in the Department  
13 of Justice case. But her judgment has been approved  
14 by the federal appellate courts, cert denied to the  
15 Supreme Court. She said that lights, natural, and  
16 other similar descriptors confer health benefits, and  
17 they are prohibited.

18 So one of the strange things about this  
19 case before Your Honor, one of the things we're  
20 asking Your Honor to do as injunctive relief is to  
21 enforce her order. The law of this land approved  
22 that "natural" is not permitted. That's the law.  
23 The FDA has issued a ruling saying that the modified  
24 tobacco risk product guidelines, which are found to  
25 be constitutional by the Discount Lottery case, that

1 we listed for Your Honor's reading, which, if you  
2 read that case alone, tell you everything you need to  
3 know about this case. You read that case, that case  
4 alone will cover everything you need to know about  
5 this case, Discount Lottery; where Reynolds is a  
6 named plaintiff.

7 Modified tobacco risk product guidelines  
8 came out after the FTC, subject to the 2009 Tobacco  
9 Act. They govern whether or not -- when you put  
10 Natural American Spirit organic tobacco out there for  
11 people to see, whether you are saying to the addicted  
12 consumer -- these are drug addicts, these are drug  
13 addicts.

14 In other words, we see on the CBS evening  
15 news and in the newspaper lately that we have a  
16 terrible problem in this country because heroin  
17 overdose deaths, drug addiction deaths have  
18 skyrocketed in the last 20 years, and they show how  
19 it went from about 4 to 10,000, all the way to  
20 40,000. But nobody takes that point and keeps  
21 raising that number to 550,000. That's how many  
22 people a year are killed by cigarettes.

23 So this is not babyfood. There is no safe  
24 cigarette. This is a lethal and poisonous substance.  
25 Justice Stevens, the Supreme Court of the United

SANTA FE OFFICE  
119 East Marcy, Suite 110  
Santa Fe, NM 87501  
(505) 989-4949  
FAX (505) 843-9492



MAIN OFFICE  
201 Third NW, Suite 1630  
Albuquerque, NM 87102  
(505) 843-9494  
FAX (505) 843-9492  
1-800-669-9492  
e-mail: info@litsupport.com

1 States said that they are a deceptive distributor of  
2 a poisonous and addictive lethal product.

3 Historically, unfortunately, tobacco has  
4 been found to be a rogue industry. The appellate  
5 court that approved the findings of Judge Kessler  
6 said "they have a proclivity for unlawful activity."

7 And the illusion of this pack of lies is so  
8 powerful that even for Your Honor, when you look at  
9 it -- we all are this way -- we have to disabuse  
10 juries of this in week and two- and three-week long  
11 trials -- the illusion of this is so powerful that we  
12 look at it like it's a box of Cheerios, or a pack of  
13 Bicycle cards, playing cards, or something that's  
14 innocuous. It isn't. This is lethal, deadly poison.  
15 This is drug addiction.

16 And when you say "natural," Judge Kessler  
17 said you're not allowed to do it. The FDA told them,  
18 you've got to take it off. And now they're trying to  
19 make a deal. And as Your Honor said, administrations  
20 change, regulatory agencies changes, the will of  
21 these regulatory bodies changes over time.

22 But here's what's interesting: And I'll  
23 approach with this. But Philip Morris bought Nat  
24 Sherman. Nat Sherman had cigarettes called  
25 "Naturals." Nat Sherman got the same warning letter

1 at the same time as Reynolds got the Natural American  
2 Spirit warning letter.

3 Well, now, if you go down the street to the  
4 smoke shop, which I did last night, I found one of  
5 the leftover -- may I approach -- one of the leftover  
6 packs of "Naturals" that no longer can be made  
7 because now this is what they changed the name to.  
8 Let me give that to the Court as well. So Phillip  
9 Morris that bought Nat Sherman; went ahead and has  
10 complied with the August 27, 2015 FDA warning letter,  
11 taken Nat Sherman's name "Natural" off. And you  
12 won't see those cigarettes anymore very soon. There  
13 was a leftover pack. I got my hands on it so I could  
14 show the Court. But "Select" is what they call it  
15 now. So at least "Select" doesn't talk about health.

16 So menthol is one of the things we  
17 emphasize to the Court because it's so obviously  
18 false to say it's not an additive, and to have  
19 something in the cigarette or the tobacco, or as Your  
20 Honor said, the device. A cigarette is a nicotine  
21 delivery device. Menthol is volatile. Anyplace you  
22 put it, it migrates everywhere. We've already done  
23 extensive testing internally with the packs of  
24 cigarettes, and we found menthol in the tobacco, if  
25 you want to make that distinction. But it's a

1 pretext and it's not necessary because their own  
2 documents, Reynolds' own document says the cigarette  
3 should not be thought of as a product of the package.  
4 The product is nicotine. And the cigarette is the  
5 most perfectly engineered dispenser of the unit dose  
6 of nicotine to the lungs.

7 Menthol, even in the filter, when the  
8 cigarette is ignited and inhaled, it draws the smoke,  
9 which mixes with the menthol, eases inhalation, gets  
10 deep into the lungs, transfers the nicotine to the  
11 brain, and causes addiction, which is every bit, if  
12 not more powerful than an addiction to heroin and  
13 cocaine.

14 That's C. Everett Koop, 1988, when he  
15 declared, much to the dismay of the tobacco industry,  
16 that nicotine addiction was killing 300,000 people a  
17 year then. It's killing 540,000 people a year now  
18 It's not a food.

19 So it's a super powerful illusion, Judge.  
20 And one of the things we try really hard to do,  
21 especially in the fact part of this case, is to show  
22 the harm of this product.

23 And every one of the experts -- you'll see  
24 in most of the articles that we cited, for instance,  
25 Judith Proshaska, who has written on Santa Fe; she's

1 a president of the Society for Research of Nicotine  
2 and Tobacco, United States major peer-reviewed  
3 publication. She's our expert witness, the leading  
4 scientist on the history of tobacco. And you must  
5 look at the history. And the case law says that the  
6 history of past misconduct of tobacco informs future  
7 control of tobacco.

8 Dr. Robert Proctor, who is a  
9 Harvard-trained full professor in the history of  
10 science and medicine, and on staff in the medical  
11 school at Stanford, and a major contributor to the  
12 Surgeon General's report is our expert witness.

13 Ruth Malone, who wrote one of the major  
14 articles that's cited in your complaint talking about  
15 the nature in which Natural American Spirit is a 21st  
16 Century version of the health reassurance fraud  
17 that's existed for decades, is our expert in the  
18 case.

19 So we tried to put enough into that  
20 complaint so Your Honor could, if you're of a mind to  
21 read that scientific literature, and see that there  
22 is no counter-narrative.

23 In other words, merely denying in their  
24 answer, in this motion to dismiss that no reasonable  
25 consumer could be confused is untenable, because this

1 is intentional. And the only reason they call it  
2 natural, organic, and additive-free, is to take an  
3 addict, a drug addict, who is fearful of dying, and  
4 undermine his resolve to quit -- intercept quitting.  
5 That's their words, their internal language.

6 I've gone on too far, Judge. I said a few  
7 things that I think are pertinent to this. Thank you  
8 for letting me have the time.

9 THE COURT: Well, let me ask -- I guess I'm  
10 showing my ignorance. But menthol, what is it? Is  
11 it a plant? Is it a chemical that science has  
12 invented? What exactly is menthol?

13 MR. SCHLESINGER: Menthol is an organic  
14 molecule that can be derived from mint. It can be  
15 derived from mint, or it can be synthesized  
16 chemically in a lab with test tubes. So it's an  
17 organic chemical. And it has structural similarity,  
18 in some strange synergistic effect with nicotine and  
19 with inhalation, anesthetic on the throat. But it's  
20 a drug. Menthol is also a chemical, with drug-like  
21 properties.

22 When they say "organic menthol" -- we  
23 haven't gotten to the facts -- presumably, they're  
24 deriving it from a leaf, probably a mint leaf. But  
25 it's still being derived and synthesized. There is



1 no such thing in nature as a menthol crystal, so to  
2 speak. It would have to be processed from the leaf  
3 of mint, spearmint, peppermint, various varieties of  
4 mint, and you can drive out the organic chemical  
5 compound, menthol. It's got ring structures, double  
6 bonds, carbon atoms, hydrogen atoms.

7 THE COURT: So the menthol that cigarette  
8 manufacturers use could be derived from a plant, or  
9 it could be created in the laboratory?

10 MR. SCHLESINGER: Yes. However, if they  
11 say "organic," that would suggest and indicate that  
12 it's plant-derived. But we don't know that. We're  
13 not at that point. We don't know that.

14 THE COURT: All right. Thank you, Mr.  
15 Schlesinger.

16 MS. WOLCHANSKY: So just to piggyback a  
17 minute after Mr. Schlesinger's comments, I think  
18 there are two things at play here. One is whether  
19 menthol is an additive. But the most important --  
20 again, to step back and look at the large picture  
21 here, we are talking about health reassurance claims  
22 on these packs of cigarettes, "natural,  
23 additive-free, organic," which tell and reassure the  
24 consumer that the products are safer or healthier.

25 So the menthol piece of this, and whether

1 menthol is -- it is literally false, which we allege  
2 it is -- to call a pack of cigarettes additive-free,  
3 when, in fact, it contains an additive, that's one  
4 piece of this. But the other piece, which is -- and  
5 we'll walk through the complaint in a moment -- these  
6 health reassurance claims on the front of the packs  
7 of cigarettes tell consumers that these are safer and  
8 healthier. And we know that because, as I just  
9 stated, the sales are so steeply on the incline, when  
10 the rest of the industry is down 20 percent.

11 And I heard Mr. Schultz say that we view  
12 the words "inherently misleading" and "deceptive" so  
13 many times, and we just don't have to accept that  
14 because we've alleged it over and over again; that,  
15 you know, this is a question of law, we haven't  
16 alleged the facts.

17 This is an interesting case, because it's  
18 in the world of misleading advertising, false  
19 advertising. And this is a space that I practice in  
20 a lot. And I have never litigated a case -- and I  
21 have had cases certified, and we've settled cases --  
22 where there is so much evidence on the misleading  
23 nature, unrebutted evidence, corroborated evidence of  
24 the misleading nature.

25 Where else do you have the government

1 weighing in? Judge Kessler, the FDA, the FTC,  
2 stating that a reasonable consumer could be misled  
3 here.

4 That's why we have the existence of a  
5 disclaimer. Now, the disclaimer does not mean that  
6 the front of the pack isn't misleading. But a  
7 disclaimer exists because the FDA, the FTC, the  
8 courts have specifically targeted these products as  
9 being potentially misleading to a reasonable  
10 consumer.

11 So to say today, as a matter of law, that  
12 we can decide, because Melissa Wolchansky gets up  
13 here, and Mr. Schultz gets up, and we make colorful  
14 arguments to the Court, that doesn't matter. What we  
15 have is scientific, unrebutted evidence in the  
16 complaint. So let's talk about that.

17 The consent order requires that the  
18 disclaimer -- which, again, this case is a lot about  
19 this disclaimer -- is there a disclaimer that means  
20 that the 100% additive and the natural claims on the  
21 front of the packs are somehow not misleading,  
22 because we put an absolute tiny, tiny text on the  
23 side of the pack -- if Your Honor would take a look  
24 with me -- "No additives in our tobacco does not mean  
25 a safer cigarette." Well, that's buried. You can

1 see the size of it in comparison to the front of the  
2 box, where natural is the first thing, Natural  
3 American Spirit is, without question, the first thing  
4 you see. And 100% additive-free is right on the  
5 bottom of that pack.

6 So, now, if I'm a consumer, I'm going to  
7 flip this around -- oh, will I find this tiny text on  
8 the side of the box with a massive bar code,  
9 questions -- you know, all these little insignias on  
10 the side of the box -- to find what that disclaimer  
11 means, a double negative: "No additives does not  
12 mean a safer cigarette."

13 Why don't we say that it is; that it's  
14 addictive; that it's dangerous. We don't. We  
15 confuse consumers with this disclaimer. It's hidden.

16 And certainly, as Mr. Reese discussed this  
17 morning, this is not preempted. But we can be sure  
18 that the FTC did not allow Reynolds to put a  
19 disclaimer -- Santa Fe to put a disclaimer on this  
20 product, with the intent of allowing the defendant to  
21 then go ahead and mislead consumers by hiding it in a  
22 place that is too small and too innocuous to see.

23 So we have the record here of all of the  
24 places where, in the complaint, the facts that we are  
25 to presume as true, at this stage in the litigation,

SANTA FE OFFICE  
119 East Marcy, Suite 110  
Santa Fe, NM 87501  
(505) 989-4949  
FAX (505) 843-9492



MAIN OFFICE  
201 Third NW, Suite 1630  
Albuquerque, NM 87102  
(505) 843-9494  
FAX (505) 843-9492  
1-800-669-9492  
e-mail: info@litsupport.com

1       why this is, in fact, misleading.

2               Here, we have the FDA warning letter.

3       "Your product labeling for Natural American Spirit  
4       cigarettes, which uses the descriptors "Natural" and  
5       "Additive-free," represents explicitly and/or  
6       implicitly that the products or their smoke do not  
7       contain or are free from a substance and/or that the  
8       products present a lower risk of tobacco-related  
9       disease or are less harmful than one or more other  
10      commercially marketed tobacco products."

11              We can stop there, Judge. We have the FDA  
12      telling Reynolds that its product is potentially  
13      misleading to a reasonable consumer because it is  
14      doing two things. One, it is telling consumers that  
15      it doesn't contain or is free from a substance; and  
16      two, it is saying that it's safer or healthier.

17              So we have facts right there in the record  
18      that could suggest -- and all we have to do at this  
19      stage in the litigation is point to reasonable  
20      inferences that, in fact, they could be liable for  
21      the conduct.

22              Next, we have the Pearson article: "The  
23      prevalence of reduced harm perception among NAS  
24      smokers also clearly demonstrates that the disclaimer  
25      statements on the packs and advertisements, are not

1 an effective means to correct consumers'  
2 inappropriate for harm perceptions."

3 Judge Kessler, as Mr. Schlesinger pointed  
4 out, has banned the use of the word "natural." We  
5 still have it. That is a huge question in this  
6 industry. Why is it even allowed to be on these  
7 packs. That Judge Kessler -- and again, cert denied  
8 at the Supreme Court, why is "natural" even on these  
9 packs? Well, that is one of the questions we'll ask  
10 Your Honor: Can we enforce that. And we hope that  
11 you will do so.

12 Next, we have the Discount Tobacco City &  
13 Lottery, where R.J. Reynolds is a plaintiff, where  
14 the court talks about R. J. Reynolds' attempts to  
15 de-link hypothetical consumers' preferences for  
16 "organic" and "additive-free" products from general  
17 health concerns" -- i.e., safer or healthier -- "is  
18 unsustainable."

19 So now we've seen the FDA, we've seen  
20 peer-reviewed articles, experts in the industry  
21 telling us that reasonable consumers can, in fact, be  
22 misled.

23 Here, the first quote on this page. "We  
24 may safely presume that naturalists and those who  
25 subscribe to organic products do not engage in

1 unmotivated or arbitrary behavior -- common sense  
2 dictates the conclusion that they prefer such  
3 products precisely because they believe that natural  
4 and organic products confer health advantages over  
5 conventional products."

6 So the suggestion that reasonable consumers  
7 are so unreasonable to think that a product that says  
8 "additive-free" or "natural" means nothing is just  
9 simply not supported by the record in this case.

10 You don't need -- I don't need to stand  
11 here and tell us. We have the facts in the  
12 complaint. And, in fact, in 2015, Santa Fe itself  
13 confirmed that "the aim" of using the terms, quote,  
14 "natural" and "additive-free" was to drive brand  
15 awareness, highlight their 100% additive-free natural  
16 proposition, and generate trial among adult smokers.  
17 So they did this knowing that those words mean  
18 something.

19 So to now suggest that they don't mean  
20 anything at all, which is in and of itself  
21 misleading, or to suggest they don't mean what the  
22 FDA, the FTC, and the courts have found, is just not  
23 right.

24 THE COURT: Ms. Wolchansky, I hate to  
25 interrupt your argument, but I'm going to have to

1 give Ms. Bean a break. We've been going for about an  
2 hour and a half. So why don't we be in recess for  
3 about 15 minutes.

4 MS. WOLCHANSKY: No problem. Thank you.  
5 (The Court stood in recess.)

6 THE COURT: All right. Ms. Wolchansky if  
7 you wish to continue your argument.

8 MS. WOLCHANSKY: Yes, sir. We were in the  
9 process of walking through all of the allegations in  
10 the complaint that demonstrate the misleading nature  
11 of the labeling of the cigarettes. Importantly, the  
12 distinction that the menthol additive, and whether or  
13 not it is literally false to call a product, quote,  
14 "100% additive-free," when in fact it contains  
15 menthol is one piece.

16 And the second is whether these  
17 representations on the front of the package and the  
18 carton: "Natural additive-free organic," mean that  
19 the product -- and reassure consumers that the  
20 products are, quote, "safer and healthier," and all  
21 of the evidence that we have in the record that a  
22 reasonable consumer, in fact, could be misled.

23 So this is where we left off, Your Honor.  
24 A 2007 study conducted by researchers at the  
25 University of California confirmed that consumers



1 "frequently concluded that 'natural' cigarettes must  
2 be healthier or safer than cigarettes containing  
3 chemicals." "Natural is similarly misleading and  
4 implies unwarranted health claims."

5 Again, we need to look at this not in a  
6 vacuum. I know that I'm up here talking about  
7 menthol and additive-free, and I'm a little bit  
8 moving into natural. But it is important to  
9 recognize that these packs of cigarettes contain the  
10 natural, the 100% additive-free, and in some cases  
11 the organic label. And these cannot just be looked  
12 at in a vacuum. We have these representations,  
13 importantly, that we do not have on competitor packs.  
14 So when you are in the store, and a consumer is  
15 making a choice -- most likely, as Mr. Schlesinger  
16 said -- a young adolescent is making a choice of  
17 which cigarette to purchase, you have Natural  
18 American Spirit, 100% additive-free cigarettes, and  
19 you have the alternative that does not contain those  
20 representations.

21 So to suggest, as a matter of law, that we  
22 can sit here today and not look at all of that  
23 evidence of what does a reasonable and a reasonably  
24 addicted consumer here, a consumer who is buying and  
25 repetitively purchasing these cigarettes, what does

1     that mean, and is it misleading? We simply cannot do  
2     that as a matter of law at this stage, with all of  
3     the evidence in the complaint.

4             Next, a 2016 study, conducted by  
5     researchers at the Schroeder Institute for Tobacco  
6     Research and Policy Studies "revealed consumers  
7     believe that cigarettes labeled or advertised as  
8     'natural, organic, and additive-free' are  
9     significantly more appealing, healthier, or less  
10    harmful than those not so labeled." And they  
11    encourage smokers to switch cigarette brands rather  
12    than quit smoking entirely. Again, this is a  
13    study -- this is scientific evidence that reasonable  
14    consumers believe that these labels: natural,  
15    organic, and additive-free appear to be safer and  
16    healthier.

17            And specifically, Natural American Spirit  
18    smokers, in a study in paragraph 52 of the complaint,  
19    the study showed that 63.9 percent of smokers of  
20    Natural American Spirit -- not just general smokers  
21    out there in the public -- of these very cigarettes  
22    believed that their brand was less harmful than other  
23    brands.

24            So how can we say here on a motion to  
25    dismiss, as matter of law, that a reasonable consumer

1 could not be misled by the representations that exist  
2 on the front of the Natural American Spirit packs,  
3 but not competitor packs, as a matter of law, they  
4 couldn't have possibly been deceived? The law just  
5 does not allow us to do that at this stage, Your  
6 Honor.

7 Ultimately, the Schroeder Institute  
8 concluded that Natural American Spirit smokers are 22  
9 times more likely than other smokers to believe that  
10 their brand is less harmful than other cigarette  
11 brands.

12 Again, we can stop with any one of these  
13 scientific studies, the FDA warning letter, FTC  
14 letter, the FTC letter that was just recently  
15 submitted by the defendants in this case, because it  
16 is all evidence that goes to the jury question of  
17 whether a reasonable consumer could be misled. And  
18 there is more than enough evidence at this stage in  
19 the litigation to draw a reasonable inference in that  
20 sense. Here, adult smokers may choose American  
21 Spirit brand because they perceive it as a less  
22 harmful cigarette based on the descriptors "organic,  
23 natural, and additive-free" on the product packaging.  
24 And here, the disclaimer is "not an effective means  
25 to correct consumers' inappropriate harm perception."

1           You will not find in all of the evidence  
2           that has been submitted, and asking the Court to take  
3           judicial notice, and any of the briefing submitted by  
4           defendants, none of this evidence has been rebutted.  
5           And it can't be, because it is reasonable consumers'  
6           belief regarding the representations on the front of  
7           those packs.

8           So, again, I don't want to belabor the  
9           point. But this is a motion to dismiss, Your Honor.  
10          And I'll go through the case law in a minute. There  
11          is more than enough evidence in the record here for  
12          this case and all of these representations and health  
13          reassurances to move forward.

14          The 2004 survey, paragraph 53, a survey of  
15          more than 1000 smokers revealed that 60 percent  
16          believe that removing additives make them less  
17          dangerous to smoke, and 73 percent believed that  
18          cigarettes with additives were more harmful. How  
19          does that not go to what a reasonable consumer  
20          believes?

21          A study published in 2016, paragraph 54,  
22          again, including the Schroeder Institute,  
23          demonstrated that the pack descriptors, "made with  
24          organic tobacco, 100% additive-free, U.S. grown  
25          tobacco," as well as other aspects of the American

1 Spirit pack design communicated lower risk.

2 So here we're talking again, safer,  
3 healthier. All of these descriptors taken alone,  
4 taken together, tell consumers, and reassure them  
5 that these are a safer and healthier cigarette.

6 Their own marketing research regarding the  
7 use of additive-free confirmed that consumers believe  
8 additive-free cigarettes to be safer. Reynolds  
9 conducted its own survey, hoping that the results  
10 would be different. This is all in paragraph 56 of  
11 the complaint. And, in fact, it came out the other  
12 way; that, no, the use of additive-free, consumers  
13 think that that would be safer, healthier.

14 We have now Reynolds' own survey; we have  
15 the FDA; we have the FTC; we have Judge Kessler; we  
16 have peer-reviewed scientific studies; we have  
17 nonprofits; we have so much evidence to suggest that  
18 a reasonable consumer would be misled.

19 And this is the Judge Kessler 1600-page  
20 order that I'm sure everyone here is reading at bed.  
21 But I pulled just a couple of nuggets out of this:  
22 Found the defendant's use of the descriptor "natural"  
23 meant that they were less hazardous to health than  
24 other cigarettes.

25 So, now, we have Judge Kessler telling us

1 that natural is misleading, in addition to lights and  
2 other descriptors.

3 "Market research shows that consumers  
4 incorrectly interpret the word 'natural' to mean that  
5 the cigarettes are safer and healthier."

6 Now, the most important piece: They aren't  
7 safer or healthier. So we have the 100%  
8 additive-free claim. They aren't. The addition of  
9 menthol; they are not safer or healthier. This  
10 little pack right here, the purple -- well, it's a  
11 blue box, but it's this purple-looking box -- has the  
12 highest total of PAH -- and Mr. Schlesinger told me  
13 what that stands for, it's in the complaint, I will  
14 not try to pronounce it -- delivering from 60 percent  
15 to 170 percent higher PAH yield than the average  
16 yield of all other cigarettes tested. This is the  
17 most dangerous, most PAHs of any of the packs. They  
18 have more heavy metals than the other cigarettes;  
19 they have the highest mean concentrations for mercury  
20 and cadmium, which is a known carcinogen, and also  
21 associated with chronic obstructive pulmonary  
22 disease. They are not safer or healthier.

23 They intentionally engineered them "to be  
24 at least as addictive as other cigarettes by creating  
25 free base nicotine, which is volatile especially when

SANTA FE OFFICE  
119 East Marcy, Suite 110  
Santa Fe, NM 87501  
(505) 989-4949  
FAX (505) 843-9492



MAIN OFFICE  
201 Third NW, Suite 1630  
Albuquerque, NM 87102  
(505) 843-9494  
FAX (505) 843-9492  
1-800-669-9492  
e-mail: info@litsupport.com

1 smoked." And, as we talked about earlier with  
2 respect to menthol, they just contain additives. It  
3 is literally false to suggest otherwise.

4 And Mr. Schultz has asked us, Well, if it's  
5 so obvious, how can that be misleading? And the  
6 Court should demand objectively truthful  
7 representations. They shouldn't be permitted to lie  
8 to consumers, and say, Oh, everyone knew we were  
9 lying. That's not fair. They concede that menthol  
10 is an additive. But they say it's so obvious, how  
11 can consumers possibly be misled? But we can't give  
12 them a free pass on this issue. The fact that it  
13 does contain menthol, and it is an additive, is  
14 something that this Court should be able to -- we  
15 should be able to talk about removal, and we should  
16 be able to talk about why, in fact, that is  
17 misleading to consumers.

18 Again, Mr. Schlesinger just came up here  
19 and talked about what menthol is. But what do  
20 consumers know about menthol? Is it grown in the  
21 field? Is it manufactured into the tobacco after,  
22 and processed? Where does it sit in the cigarette  
23 itself? These are all questions that we will be able  
24 to answer as we go through discovery.

25 I will hold on the manufacturing processes

1 specifically, but I do want to talk for a moment  
2 about the law because it is important and it is very  
3 in our favor here. This is all detailed in the  
4 complaint. But where we start here, when we talk  
5 about the law, this is not an issue that is  
6 appropriate for determination on a motion to dismiss.

7 Defendants have cited very, very few cases  
8 where the court was able, at a motion to dismiss --  
9 and I would submit that the Court shouldn't in a  
10 motion to dismiss ever weigh the evidence, because we  
11 take all the evidence in the complaint as true, which  
12 is why the absolute majority of case law on  
13 reasonable consumer find that this is a jury issue,  
14 not appropriate, either on demurrer in California,  
15 there are a lot of cases, and we have cited cases in  
16 every single jurisdiction, I believe except maybe  
17 one, where it is not appropriate for the Court on a  
18 motion to dismiss to weigh the evidence.

19 Now, the Gerber case, the Williams versus  
20 Gerber case, which is a Ninth Circuit decision,  
21 widely cited, all you have to do is Shepardize the  
22 Williams versus Gerber case, to see that it is cited  
23 in many different circumstances, not just in food  
24 products. And the court finds that it is a rare  
25 situation in which granting a motion to dismiss on a



1 reasonable consumer is appropriate. We cited three  
2 pages in our brief of case law on that point; that it  
3 is not appropriate on a motion to dismiss to find  
4 what a reasonable consumer may or may not believe.  
5 And I can tell Your Honor -- and I've read all those  
6 cases -- none of them had nearly the evidence that we  
7 have in this case on what is misleading to a  
8 reasonable consumer.

9 Most of those cases will never have this  
10 much evidence, even if those cases go to trial. A  
11 natural case on the front of a food product or a baby  
12 food, maybe the complainants in that case will  
13 conduct a consumer survey. Maybe the defendant's  
14 internal documents in that case will show that they  
15 intended to market that product to mislead consumers.  
16 I litigated a lot of those cases. There aren't so  
17 many of those documents.

18 But here, we have so much evidence, and we  
19 walked through it. And I'll leave the Court with a  
20 copy of this PowerPoint, but all of this comes from  
21 the complaint. So much evidence regarding what, in  
22 fact, has and will continue to mislead a reasonable  
23 consumer.

24 So the very few cases that defendants have  
25 cited, where the Court was able just at the motion to

1 dismiss to say, Oh, evaporated cane juice, doesn't  
2 really seem to be that misleading on the front of  
3 label; that is not this evidence. We have evidence  
4 and we have cited all the cases in our brief: The  
5 Williams versus Gerber case is absolutely on point.

6 There are a couple of cases that the  
7 defendants have cited where that is a disclaimer, and  
8 the disclaimer is in the Trujillo case, in the  
9 Freeman versus Time case. The Court in both of those  
10 cases focused on the placement of the disclaimer, and  
11 the prominence of the disclaimer. Neither of those  
12 fact scenarios exist here.

13 We have, as Your Honor has seen, a very,  
14 very tiny disclaimer that does not comply with the  
15 consent order, is not in either location, type, font,  
16 size, near to the representations on the front of the  
17 pack, and, again, all of this evidence that supports  
18 the proposition that a reasonable consumer might be  
19 misled, even though that disclaimer exists.

20 The FDA warning letter itself states, and  
21 the disclaimer has been in place, that consumers  
22 could be misled by the existence of those labels on  
23 the front. And, again, they're in negotiation right  
24 now with the FDA regarding the use of those words on  
25 the front of the package despite the existence of the

1 disclaimer. So we know that consumers can still be  
2 misled.

3 The Ackerman case is also on point. There,  
4 we have representation on the front of the pack, and  
5 we have a, quote, disclaimer on the back, where we  
6 have an FDA mandated label that talks about how much  
7 sugar is, in fact, in the product. And the court  
8 found the fact that the actual sugar content was  
9 accurately stated in an FDA mandated label does not  
10 eliminate the possibility that reasonable consumers  
11 may be misled.

12 So this notion that "menthol" might be very  
13 tiny on the back of this pack, so it's not misleading  
14 to say on the front to say it's additive-free, the  
15 case law just simply doesn't support that.

16 The Jou versus Kimberly-Clark case, 2013  
17 Westlaw 6491158, "Defendant cannot rely on  
18 disclosures on the back or side panels of the  
19 packaging to contend that any misrepresentations on  
20 the front of the packaging is excused."

21 There are many cases in our brief, Your  
22 Honor, that are cited in that regard, that you cannot  
23 disclaim something on the back or side that is  
24 misleading on the front.

25 The argument that they make, the defendants

1 make in their brief is that the decisions that we  
2 cite to are inapposite because they deal with  
3 disclosures that directly contradict  
4 misrepresentations.

5 But that's exactly what we have here. The  
6 idea, the representations on the front "natural, 100%  
7 additive, organic," all of the evidence that we've  
8 cited that those representations and health  
9 assurances are that these cigarettes are healthier  
10 and safer.

11 And then on the side we have something that  
12 seems to suggest, although it's confusing, that it's  
13 not safer. That's a direct contradiction. So the  
14 case law that we cited is absolutely on point.  
15 Defendants also claim that it's, quote, "more  
16 detailed information." Well, we're saying on the  
17 front that it's "natural and additive-free," and then  
18 on the side we're telling you it doesn't actually  
19 mean it's safer; that's not what that is. It's  
20 contradictory to the prominent statements on the  
21 front label that, as we've seen in all of these  
22 allegations in the complaint tell consumers that  
23 these products are safer or healthier.

24 The bottom line is all of these  
25 representations implicate the larger issue of the

1 relationship between the factual misrepresentations  
2 on the front of the package, and the disclaimer of  
3 that representation on the side.

4 So if you consider "natural," under their  
5 reasoning, they should be able to conspicuously  
6 misrepresent on the front that these cigarettes  
7 contain natural, unprocessed tobacco, or  
8 additive-free tobacco, just as it was harvested from  
9 the field, but then neutralize that with a prominent  
10 statement on either the side or the back that says,  
11 "the tobacco has been highly processed after  
12 harvesting."

13 We shouldn't allow them to do that here  
14 today with regard to additive-free, with regard to  
15 natural. It's misleading. And there is plenty of  
16 evidence here for the Court to look at in the  
17 complaint to deny this motion on the reasonable  
18 consumer.

19 I have a bit more on the natural  
20 processing, but I will defer to Mr. Biersteker or Mr.  
21 Schultz for now, unless the Court has other  
22 questions.

23 THE COURT: No, not at the present time.  
24 Thank you, Ms. Wolchansky.

25 All right. Mr. Schultz, do you want to --

1 I'll give you the last word on the menthol. And if  
2 you want to go into these other areas that Ms.  
3 Wolchansky -- and on your PowerPoint, I do want to  
4 see it, but file it. So just put it on CM/ECF, just  
5 file it as a document. I do want to see it.

6 All right. Mr. Schultz.

7 MR. SCHULTZ: Thank you, Your Honor.

8 Your Honor, I want to just touch briefly on  
9 where I was. We were specifically talking about the  
10 menthol-free issue. And I'll say that, Your Honor,  
11 because -- I think the only last point I'd like to  
12 make on this is very similar to a point that you made  
13 at the very introduction, when you were talking about  
14 your reaction to all three of the theories. And on  
15 the theory about the manufacturing process, the Court  
16 made the observation cigarettes don't come off a  
17 cigarette tree. So to say that the word "natural"  
18 somehow was misleading, that a cigarette hadn't gone  
19 through some kind of manufacturing process didn't  
20 strike you as misleading to the reasonable consumer,  
21 the same is true on the menthol issue. Menthol  
22 cigarettes don't exist in nature. The only way to  
23 get a menthol cigarette is to have tobacco and  
24 menthol.

25 THE COURT: Well, I guess -- and that's

1 where I think that "natural" is not the biggest  
2 concern with me as far as the menthol claim. It's  
3 the no additive portion of it. I know we were  
4 drifting back and forth in the response, but I --  
5 that is the reason, it's the no additive words that  
6 give me the concern.

7 MR. SCHULTZ: Well, again, Your Honor, the  
8 only thing I would point to is, again, what the  
9 representation on the front is 100% no additive  
10 tobacco. And on the back -- you asked the question,  
11 Your Honor, what is menthol, and --

12 THE COURT: See, when I read that  
13 statement -- I see the way you read it. But it's two  
14 lines. And, of course, what the plaintiffs focus on  
15 it is 100% additive-free, and then underneath it it  
16 says "natural tobacco." Is that communicating two  
17 messages or one? You're saying it's one; that it's  
18 100% additive-free natural tobacco. But I think that  
19 what the plaintiffs have been saying is that it's  
20 communicating two messages. One that it's 100%  
21 additive-free and then it also contains natural  
22 tobacco.

23 MR. SCHULTZ: And I guess my sixth grade  
24 teacher and the way she taught me to diagram  
25 sentences would disagree with that characterization,

1 Your Honor.

2 THE COURT: Well, it's not a sentence any  
3 way we cut it.

4 MR. SCHULTZ: I won't argue the grammar,  
5 Your Honor.

6 But again -- I'll move on after this -- but  
7 to look at both the front and the back together,  
8 which the Court, in looking at what a reasonable  
9 consumer would understand, the cases have instructed  
10 the Court to consider all of the circumstances. So  
11 if the Court looks at the front and then looks at the  
12 back, where it says "ingredients" and it says,  
13 "organic tobacco" and "organic menthol." The  
14 plaintiffs are still hard pressed, and have not  
15 explained how a consumer, who wishes to buy a menthol  
16 cigarette believes that they will get a menthol  
17 cigarette with anything other than tobacco and  
18 menthol.

19 And here, the company is very clear in  
20 exactly what kind of tobacco they're getting and what  
21 kind of menthol they're getting. So all of the long  
22 discourse notwithstanding, Your Honor, that really is  
23 the bottom line on the menthol question. For a  
24 reasonable consumer, who walks into the store and  
25 chooses a menthol cigarette, knowing that a menthol



1 cigarette doesn't exist in nature, how are they going  
2 to get that? And what, if anything, did the company  
3 tell them that was deceptive in any mean, or that  
4 would lead them to believe that they did not purchase  
5 exactly what they thought?

6 Your Honor, because the plaintiffs spent so  
7 much time on their first theory, I'd like to address  
8 that.

9 THE COURT: Can I give you the thing  
10 that -- I told you at the beginning I wasn't really  
11 excited about this claim because of the reasons the  
12 FTC gives for its consent decree. But the one thing  
13 that sort of lingers in my mind that's a little bit  
14 troubling is, when you look at the disclaimer --  
15 before I really focused on the product itself -- and  
16 I just read the briefing -- I thought what I would be  
17 seeing on the side of the package is that "natural,  
18 free, and no additives in our tobacco does not mean a  
19 safer cigarette." What did I just say? Yes, the  
20 fact that the tobacco is natural and that there are  
21 no additives does not mean a safer cigarette. But  
22 the disclaimer is a little different. It focuses, in  
23 my mind, on the no additives, and doesn't really  
24 address the issue about the "natural."

25 So it would seem to me that, when I read

1 the FTC's concerns, and how they're addressing it, I  
2 guess I would have thought that there would have been  
3 a different disclaimer; that 100% -- or just say, I  
4 guess, "natural tobacco and 100% additive-free does  
5 not mean a safer cigarette." Do you see my concern?  
6 I agreed with what the FTC was saying. But then I  
7 was surprised by the disclaimer, and whether it fully  
8 addressed their concerns. They seem to have dropped  
9 out the word "natural" on the disclaimer.

10 MR. SCHULTZ: Well, and Your Honor, the FTC  
11 chose what it chose, and we have complied with that.  
12 I want to make a very specific point on that. Your  
13 Honor was looking at the package. And since you've  
14 read the FTC, you know that there was no requirement  
15 in the FTC that this be put on the package; it was  
16 with our advertising.

17 And if the Court looks at, starting on  
18 paragraph 43 in the complaint, pages 17, 18, 19, 20,  
19 21, the advertising is listed. And there, Your  
20 Honor, you see that not only is the FTC disclaimer  
21 there, but also language to the effect -- not only  
22 with the Surgeon General's warnings, but also the  
23 disclaimer that "organic tobacco does not mean a  
24 safer cigarette." So that is in the advertisement,  
25 Your Honor, and you can see that on several of the

1 ads --

2 THE COURT: Why did the defendants choose  
3 not to track what's in the advertising and then put  
4 it on the product? Because I thought one of the  
5 arguments that the defendants had made in the  
6 briefing was: We went beyond what the FTC required;  
7 we put it on the labeling. But that's not quite  
8 true. It shows a different disclaimer on the product  
9 than it did in the advertising, because the  
10 advertising wasn't being required by the FTC.

11 MR. SCHULTZ: Your Honor, at that point,  
12 I'd be going far beyond anything that is alleged in  
13 the complaint. I think the simple matter, and a  
14 better way to look at this, Your Honor is, if you  
15 look at the first motion for judicial notice. And in  
16 the exhibits, where it shows the pack, there is a  
17 more graphic depiction of what the pack looks like  
18 laid out. And I think, if the Court looks at it that  
19 way, or even just from the pack this way, it's fairly  
20 obvious to see that there isn't a whole lot of space  
21 that's left on this pack for anything more to be  
22 added.

23 So the language in our brief was 100  
24 percent correct. We went beyond what the FTC  
25 required with regard to the disclaimer, in the sense

1     that the FTC never required the disclaimer to be  
2     placed on the packaging. So that part is still a  
3     true statement, Your Honor.

4             But more to your point about the difference  
5     between what the FTC has, and what appears in our  
6     advertising, I think those disclaimers cover both.  
7     It covers both that "no additives in our tobacco does  
8     not mean a safer cigarette" and "organic tobacco does  
9     not mean a safer cigarette." And that comes directly  
10    from the plaintiff's complaint at paragraph 43.  
11    That's what this motion is about. It's about the  
12    adequacy of what is in the complaint.

13            And, Your Honor, one of the bottom lines on  
14    this entire issue, this whole safer cigarette theory,  
15    is plaintiffs went to great length to talk about the  
16    detail of everything that is in their complaint. The  
17    one thing that is missing in the complaint in all  
18    several hundred of their allegations, they nowhere  
19    mention the use of the FTC disclaimer. They focus  
20    solely on the language on the front of the package,  
21    but they don't discuss -- they don't address how that  
22    fits with the FTC disclaimer that appears in the  
23    advertising.

24            And in looking at what a reasonable  
25    consumer would look at, the reasonable consumer is

1 going to look at both of these things. So, rather  
2 than a reasonable consumer, what the plaintiffs are  
3 postulating is an unreasonable consumer. An  
4 unreasonable consumer who either only reads the front  
5 of a pack, and nothing else, or, even worse, reads  
6 the advertisement, sees the language "100%  
7 additive-free natural tobacco," and then does not  
8 read anything else that appears on that page; that  
9 appears in clear letters, in letters and in fonts  
10 that are prescribed by the FTC, surrounded in a white  
11 box. That is not a reasonable consumer. That is not  
12 a person who has made a reasoned choice in what  
13 they're going to purchase. So only a consumer who  
14 ignores these express disclaimers is the kind of  
15 consumer that the plaintiffs want to parade in front  
16 of you. And that's just not simply who the  
17 reasonable consumer is.

18 It's interesting, Your Honor, in their  
19 response to our motion, the plaintiffs seem to almost  
20 concede this point with regard to our advertising.  
21 They make virtually no argument about the adequacy of  
22 the disclaimers in our advertising. And they focus,  
23 instead, solely on the packaging. There --

24 THE COURT: That's good for you, isn't it?

25 MR. SCHULTZ: We'll take what we can get,

1 Your Honor, absolutely. We agree with that  
2 completely.

3 But let's just focus, then, on the  
4 packaging. Now, the issue is about what is the  
5 effect of that disclosure on the reasonable consumer?  
6 The defense position has been that that disclosure in  
7 no way contradicts the language that appears on the  
8 front, "natural" or "additive-free," but it helps to  
9 amplify its meaning.

10 And the plaintiffs agree. I would ask you,  
11 Your Honor, to look at their response at page 46.  
12 This is what they say: Quote, "Reasonable consumers  
13 should be able to expect that the information on the  
14 side of the package simply provides more detailed  
15 confirmation of the representation on the front."  
16 That's their language. And that's exactly what we  
17 have here, Your Honor. We have a statement that says  
18 "natural, additive-free," and then language on the  
19 side.

20 THE COURT: What they're saying is it  
21 doesn't complement what's on the front. It takes it  
22 away. It says it on the front, and takes it away on  
23 the back.

24 MR. SCHULTZ: Your Honor, that's their  
25 interpretation of the word "natural." And the

1 problem that we have with that, and the problem that  
2 other cases have had that use the word "natural," is  
3 the word "natural" has no content. And when it has  
4 no content, courts have held --

5 THE COURT: That troubles me. I know cases  
6 have said that. But it's such a -- I mean, we've got  
7 Whole Foods and Sprouts, and everything; we've got a  
8 whole industry out there that pushes this. To say it  
9 has no content concerns me a little bit.

10 MR. SCHULTZ: Well, and I can understand  
11 the concern, Your Honor.

12 THE COURT: I mean, it may be ambiguous; it  
13 may be misleading; it may not be very informative.  
14 But take a good English word and say it has no  
15 content troubles me a little bit.

16 MR. SCHULTZ: Well, Your Honor, I think the  
17 problem that courts have had when they've talked  
18 about that is, if we're going to talk about what a  
19 reasonable consumer is -- and you see this same line  
20 of thought in talking about what is inherently  
21 misleading under the First Amendment.

22 The Court says: If we're going to look at  
23 that, there should be some standard that we can  
24 measure against. Reasonable consumer, we're talking  
25 more of an objective standard. And when we don't

1 have that objective touchstone to go against, the  
2 word "natural" becomes so ubiquitous that it almost  
3 loses all meaning. So it's difficult to know what  
4 any consumer, let alone a reasonable consumer, will  
5 think when they read it, because it can have  
6 different meanings in different contexts.

7 So the plaintiffs' point that the word  
8 "natural" automatically means safer -- well, we could  
9 probably have a war of dictionaries, Your Honor, as  
10 to where that appears, or whether that's a construct  
11 that is placed on there by the plaintiff. But the  
12 fact of the matter is that a reasonable consumer  
13 reading the entirety of an ad, the entirety of a  
14 package, where they see the word "natural," or they  
15 see the word "additive-free," and then they are told  
16 repeatedly: "No additives in our tobacco does not  
17 mean a safer cigarette. Organic tobacco does not  
18 mean a safer cigarette." And they're given the  
19 Surgeon General's warning about smoking in general.

20 Again, Your Honor, only an unreasonable  
21 consumer will ignore all of that and assume that the  
22 word "natural" can have one, and one meaning only,  
23 and that is a meaning that equates natural with  
24 safer. We just simply don't believe, Your Honor,  
25 that that is what a reasonable consumer would do.



1 And, also, it's certainly not what the case law has  
2 done.

3 Particularly, Your Honor, we'd point the  
4 Court to the Kane versus Chobani case, 2013 case from  
5 the Northern District of California. The Court said  
6 that "where a label clearly discloses the preference  
7 of an unnatural ingredient, it is implausible that  
8 the plaintiff would believe the defendant's  
9 representation of all natural ingredients."

10 THE COURT: What was the product in that  
11 case?

12 MR. SCHULTZ: It was yogurt, Your Honor.

13 Or Foreman versus Pfizer; that had to do  
14 with how many pills happen to be an Advil bottle.  
15 And the Court said: It's just not plausible that the  
16 company in any way misled about the number of pills,  
17 when you can't read the whole box and not understand  
18 how many pills are in the bottle.

19 So, Your Honor, the same holds true here.  
20 The defendant's packaging, the advertising expressly  
21 state that the cigarettes are not safer than other  
22 cigarettes. And as a result, Your Honor, no  
23 reasonable consumer could be misled to think anything  
24 else.

25 Your Honor, if you want, I can address

1     their last claim, or --

2             THE COURT:   Well, why don't I see if Ms.  
3     Wolchansky has anything else she wants to say on this  
4     first theory about the natural and additive, because  
5     under the theory that primacy is first, they must  
6     have thought this -- they may have thought this was  
7     their strongest argument.   So let me see if she has  
8     anything else on this.   And then we'll come back to  
9     the manufacturing or engineered product.

10            Mr. Schlesinger, do you want to say  
11   anything further on this first theory, first claim?

12            MR. SCHLESINGER:   Yes.   And I'll go back  
13   to -- you know, Judge, I'm like the closing argument  
14   guy.   And so when it comes to the motion to dismiss  
15   and stick to the pleadings and, you know, accept  
16   everything as true, I look at the big picture, and I  
17   go back to this concept, which is very simply that --  
18   and Your Honor may have picked up on it when you said  
19   what kind of product it is.   You'll notice they don't  
20   cite tobacco cases, because the tobacco cases  
21   uniformly support us through all jurisdictions:  
22   federal, state court, lower Supreme Court case, they  
23   all support our position.   They cite food and things  
24   like that.

25            And I think, when I heard Mr. Schultz say

SANTA FE OFFICE  
119 East Marcy, Suite 110  
Santa Fe, NM 87501  
(505) 989-4949  
FAX (505) 843-9492



MAIN OFFICE  
201 Third NW, Suite 1630  
Albuquerque, NM 87102  
(505) 843-9494  
FAX (505) 843-9492  
1-800-669-9492  
e-mail: info@litsupport.com

1 the reasonable consumer -- it would be unreasonable  
2 to think of "natural" as meaning healthful, it  
3 occurred to me that the mind, the brain of the  
4 drug-addicted consumer is somewhat unreasonable,  
5 because the brain has been changed by the addictive  
6 nicotine.

7 THE COURT: Well, if we go that route,  
8 though, don't we just really throw out the standard?  
9 We don't have a standard; we're just saying: We've  
10 got drug addicts we're targeting here, so that's your  
11 reasonable consumer? I mean, doesn't that just  
12 mean -- basically mean we don't have a standard?

13 MR. SCHLESINGER: Oh, I think we definitely  
14 do. I just think that we have to consider the  
15 standard in light of the reasonable consumer standard  
16 that might ought to be modified, in light of the  
17 defendant's target audience, and just say that it's a  
18 reasonably -- it's a reasonable, but already  
19 addicted, nicotine-addicted consumer. So we think  
20 about that in terms of a cigarette that they say  
21 doesn't mean safer as a disclaimer, when, in fact,  
22 it's got more cancer than any other cigarette on the  
23 market.

24 THE COURT: But I guess, you know, our last  
25 President smoked cigarettes. And to sort of picture

1 him as a drug addict and unable to read a label on a  
2 cigarette, I don't know, that -- it seems to me I  
3 could say somebody like him is a very reasonable  
4 consumer.

5 MR. SCHLESINGER: No doubt. It's really  
6 hard. It's a tight -- it's a very difficult illusion  
7 to break. Because we all grew up -- we all lived in  
8 a culture that the tobacco industry created, and has  
9 been found guilty of racketeering, conspiring,  
10 corrupt organization conduct in misleading the  
11 American people for decades. So we grew up in this  
12 environment where people think that everything you  
13 need to know about cigarettes is known. And there is  
14 a very powerful illusion.

15 But here's what I would say about the  
16 "natural," is that if it means nothing in particular,  
17 then their use of the term to describe the product is  
18 confusion and misleading.

19 THE COURT: Well, I signaled that I don't  
20 think it doesn't mean anything. That troubles me  
21 that people in the corporate world that use "natural"  
22 must think it means something, or they wouldn't use  
23 it. And so I do think it means something. I don't  
24 think it's so empty of meaning.

25 MR. SCHLESINGER: Agreed.

1 THE COURT: But I guess I'm a little -- it  
2 seems to me it's a little bit of a leap to then say  
3 that because you tell people you're using a natural  
4 tobacco product that you're signaling to them it's a  
5 safer tobacco product.

6 MR. SCHLESINGER: Yes.

7 THE COURT: And that leap is the one I'm  
8 having trouble making.

9 MR. SCHLESINGER: And what I'm asking Your  
10 Honor to do is -- first of all, I completely  
11 recognize where Your Honor is coming from, because  
12 your preconceived conception of it is understandable,  
13 and is a commonly held belief in the American public.  
14 Your mindset on it is exactly the way 8 out of 10 of  
15 our jurors will answer the same question when we ask  
16 them -- when we impanel them hundreds at a time in  
17 what's been 250 trials in the State of Florida, going  
18 through thousands of jurors, you're very much in the  
19 mainstream of thought on this.

20 And what I ask Your Honor to do is suspend  
21 your disbelief, and let us get past this motion to  
22 dismiss, so you can learn in the unfortunately  
23 necessary intricacies and detail of the science that  
24 exists, the courts that have labored for eons on  
25 this, and have all concluded that, in the context of

1 a nonfood product, an inhalable, addictive drug --  
2 which is all a cigarette is -- there is no other --  
3 as Reynolds says, "Nicotine is a sine que non of  
4 smoking, without which this is nothing. If there was  
5 no nicotine in cigarettes, our industry would  
6 collapse overnight." And recognize that it takes a  
7 while to understand this stuff. There has been  
8 eminent researchers have explained -- and again,  
9 Judge Kessler, who is a District Court Judge in D.C,  
10 has ordered "natural" to be removed. And that's her  
11 judgment.

12 In other words, you're looking at a product  
13 that we say unlawfully contains the word "natural"  
14 because it promotes safety. And what my thinking is  
15 that you want to avoid language that causes  
16 confusion. And that if "natural" is -- doesn't have  
17 a precise or fixed meaning, at a minimum, the word,  
18 to a reasonable consumer would suggest that tobacco  
19 in Natural American cigarettes was not the produce of  
20 human alteration, manipulation, or engineering.

21 And while Your Honor said cigarettes don't  
22 grow from trees, tobacco's impression that they want  
23 to convey with an all natural product is very much  
24 that tobacco does grow from trees; that it's a plant.  
25 And they just take it, and wrap it up. And that

1 those additives that the consuming public had come to  
2 think are the reason smoking is bad for you are gone.  
3 And they're natural without those additives. When,  
4 in fact, it's the combustible smoke which contains  
5 7000 different chemicals and over 60 known  
6 cancer-causing chemicals that happens when you ignite  
7 and inhale the smoke, which is the delivery vehicle  
8 for the nicotine, which causes the addiction, and the  
9 mass daily consumption of cigarettes, where people  
10 smoke enough to get sick.

11 Think about it: 20 cigarettes in a pack;  
12 10 puffs per cigarette; 10 inhalations is 10 nicotine  
13 doses to the brain per cigarette. That's 200 puffs  
14 per day from the first thing in the morning when they  
15 wake up till the last thing they do before they go to  
16 bed at night. That's crazy mass daily consumption.  
17 If I stood before you and said, Judge, you ought to  
18 know I'm pack-a-day smoker, the average person will  
19 say, hey, that's legal, that's fine, no problem, you  
20 should do it, because they don't know what's really  
21 in it.

22 But if I said, Hey, Judge, every morning I  
23 get up before I come to court and I have a Jack  
24 Daniels and Coke 30 minutes after I wake up. And  
25 just so you know it, I have 19 more before I go to

1 bed, 10 sips on that cocktail every single day. And  
2 you know what I've done it for? Every day of the  
3 week for the last 30 years of my life. Everyone in  
4 this courtroom would know that I would be an  
5 alcoholic under that definition.

6 But somehow the tobacco industry, they're  
7 the great seductionists. And they lower the  
8 perception, appreciation of the threat level, as they  
9 do with the language "natural," to folks who are  
10 reasonable consumers who have the problem of  
11 addiction which compromises choice, alters the way a  
12 brain works.

13 THE COURT: But if you told me that you did  
14 what you did with whiskey and Coke every day, would I  
15 think you're a very reasonable consumer?

16 MR. SCHLESINGER: I don't know. You'd  
17 think I was an alcoholic.

18 THE COURT: I'd probably think, you know,  
19 they could put "This is poison you're about to take,  
20 and it's going to kill you by noon," it wouldn't stop  
21 you.

22 MR. SCHLESINGER: It might. But then why  
23 don't they do that? In other words, if the "natural"  
24 doesn't mean anything, and if Judge Kessler said it's  
25 not lawful, and the FDA said, it means it's a



1 modified risk tobacco product, and you have to prove  
2 it's safer, why don't they take the word "natural"  
3 off and put "addictive" on there?

4 Do you know that, to this day, there is no  
5 pack of cigarettes in the United States except the  
6 Liggett brand, which is less than 1 percent of the  
7 market that says "Smoking is addictive." The  
8 warnings, the federal warnings are from 1984.

9 THE COURT: Well, but that's not our case,  
10 right? We're not talking about they should have  
11 "addictive" or something else on there. We're  
12 talking about specifically whether "natural" means --  
13 conveys to the reasonable consumer that it's a safer  
14 cigarette.

15 MR. SCHLESINGER: And I agree with you up  
16 to the point that defendants themselves tout the  
17 Surgeon General's warnings as being helpful and  
18 additional information, when, in fact --

19 THE COURT: They do.

20 MR. SCHLESINGER: -- they haven't modified  
21 since 1984, 33 years ago, when the graphic warning  
22 labels that are mandated by the Tobacco Act and are  
23 in charge of the FDA to put forward, the FDA hasn't  
24 put them forward, Tobacco Free Kids filed a lawsuit  
25 along with American Academy of Pediatrics to try to

1 get these graphic warning labels out, because people  
2 still don't understand just how deadly dangerous and  
3 addictive cigarettes are. And the fact is, they  
4 don't -- is this providing useful information about  
5 this product to say "organic Natural American  
6 Spirit," a product that's really just an addictive  
7 drug?

8 THE COURT: Well, educate me a little bit.  
9 Let's say we're talking about a pack of Marlboros.  
10 Do they put something into the tobacco that maybe  
11 Natural American Spirit does not put into their  
12 tobacco?

13 MR. SCHLESINGER: They do.

14 THE COURT: And so I guess I think then  
15 there is your distinction.

16 MR. SCHLESINGER: There is a distinction.  
17 Marlboro uses reconstituted tobacco, paper tobacco,  
18 where they take the stems, the pulp, the seeds; they  
19 grind it up, crush it. And they actually have paper  
20 mill unions that roll it out as paper, chop it up,  
21 and it looks like cigarettes, and they put  
22 reconstituted tobacco in. They use diammonium  
23 phosphate.

24 THE COURT: So if I'm somebody that shops  
25 at Whole Foods, and I also want to have a natural

1 tobacco, this is my product, right?

2 MR. SCHLESINGER: Well, that's --

3 THE COURT: I want all those stems.

4 MR. SCHLESINGER: Well, that's part of the  
5 distinction that Natural American Spirit trades on.  
6 But at the end of the day, it's still delivering as  
7 much, if not more nicotine. It's still delivering,  
8 according to our complaint, the free base nicotine.  
9 And it's got more cancer in it.

10 THE COURT: Well, tell me, though, then  
11 that -- tell me then how it's defective to say no  
12 additives in our product does not -- capitalizing all  
13 three letters of "not" -- mean a safer cigarette.  
14 Tell me what then is wrong with that disclaimer?

15 MR. SCHLESINGER: A couple interesting  
16 things about it. The FDA decided that disclaimer was  
17 inadequate, and has taken control and authority over  
18 this, and rejected the FTC's consent ruling. And  
19 that's in the letter that's attached to the complaint  
20 from August 27, 2015, by the FDA, saying this is a  
21 modified risk tobacco product.

22 The disclaimer is worded as a double  
23 negative. It doesn't use the term lethal. It  
24 doesn't say: This cigarette here is more lethal than  
25 any other cigarette on the market. It says "no

1 additives in our tobacco."

2 THE COURT: We don't know that to be the  
3 case, do we?

4 MR. SCHLESINGER: Oh, yes, sir. Appended  
5 to our complaint is the study that tested the 50 most  
6 popular brands of cigarettes sold domestically in the  
7 United States, and the amount of cancer, polyaromatic  
8 hydrocarbons, which is a major cancer causing -- lung  
9 cancer causing carcinogen in cigarettes exists in a  
10 much higher state, number one, in the American Spirit  
11 blue pack over every other cigarette in the country,  
12 Marlboro, Camel, Newport --

13 THE COURT: How many different cigarettes  
14 of Natural American Spirit are there?

15 MR. SCHLESINGER: Well, these are -- I'll  
16 bring all these to Your Honor, because I think, if  
17 we're going to have a case on products, you ought to  
18 have the product. That's why I brought them.

19 THE COURT: But do they make 50 products?

20 MR. SCHLESINGER: They make something like  
21 a dozen different colors.

22 THE COURT: When you said "50 products,"  
23 what were you referring to?

24 MR. SCHLESINGER: The 50 major domestic  
25 brands across all brands, we have -- in other words,

1 we may have Philip Morris makes Marlboro, the number  
2 one selling brand. They come in a bunch of different  
3 colors and varieties. Philip Morris makes Marlboro.  
4 That's the number one selling brand. It's got over  
5 50 percent of the market all by itself.

6 THE COURT: So there is multiple brands in  
7 the products -- in the 50 that you just mentioned?

8 MR. SCHLESINGER: Yes, line extensions they  
9 call them.

10 THE COURT: It's not just Natural American  
11 Spirit?

12 MR. SCHLESINGER: Yes, sir. In other  
13 words, the research -- the article that we cite went  
14 ahead and tested for cancer causing chemicals, PAHs.  
15 They tested Marlboro, they tested Camel, they tested  
16 Newport. So they tested Reynolds and Philip Morris  
17 products.

18 And as Your Honor may know, as we sit here  
19 today there is really two manufacturers in the United  
20 States that own all the companies, own all the brands  
21 and have absorbed every other company. So we've got  
22 Philip Morris, and its flagship brand is Marlboro.  
23 And we have Reynolds, R. J. Reynolds, RAI. And their  
24 flagship brand now is Newport and Camel. And Media  
25 Work, astronomical growth, Natural American Spirit,

1 which has captured now over 2 percent of the tobacco  
2 market, which, believe it or not, is a billion  
3 dollars of tobacco sales of Natural American Spirit  
4 cigarettes.

5 And that's why, to a certain extent, when I  
6 say enforce Judge Kessler's order, time is of the  
7 essence because, just like the Marlboro Lights had to  
8 take the word "lights" off, but if you go into any  
9 store in the United States, ask anybody for a pack of  
10 Marlboro Lights, and it doesn't matter who is behind  
11 the counter, they'll hand you a pack of Marlboro  
12 Gold. Because gold is the symbol for Lights;  
13 everybody knows it. Anywhere in this country, you  
14 can go into any store anywhere and say, "I want  
15 Marlboro Ultralights"; they'll give you the silver  
16 pack. So the symbolism becomes attributable to the  
17 product, at some point, even without the word  
18 "natural," even without the word "organic," even  
19 without the term "additive-free." The mere fact of  
20 American Spirit having positioned itself as a health  
21 reassurance brand of the 21st Century, will endure  
22 beyond this Court's rulings. Even if there were in  
23 acceptance of our position, there is some point where  
24 it won't matter.

25 As far as the reasonable consumer is

1 concerned, I think perhaps the only effective way to  
2 avoid gamesmanship is to adopt a per se rule that  
3 contradictory factual assertions about a product are  
4 inherently misleading as a matter of law. The aim of  
5 the law should be to discourage the initial  
6 misrepresentation; not encourage clever, post hoc  
7 disclaimers of that misrepresentation.

8           There is a case -- I don't know if we cited  
9 it -- but it's called Carter Products versus Federal  
10 Trade Commission. It's an old case, cited at 186  
11 F.2d 821 in the Seventh Circuit, 1951 case. And this  
12 is just a couple years before the cancer scare of  
13 cigarettes. But this is Carter versus Federal Trade  
14 Commission, 186 F.2d 821, Seventh Circuit, 1951.  
15 We'll provide this case. It talks about how "the law  
16 is violated if the first contact is secured by  
17 deception, even though the true facts are made known  
18 to the buyer before he enters into the contract to  
19 purchase." In other words, the come-on should not be  
20 deceptive or trickery.

21           And, you know, the courts should be  
22 encouraging -- and this is cited in one of the cases,  
23 not only the free flow of information, but the free  
24 flow of clean, truthful, complete information that's  
25 useful. It is not useful or beneficial to the

1 consumer, particularly an addicted consumer, to  
2 make -- to reassure an addict. Because the whole  
3 idea of addiction is that reassurance, health  
4 reassurance, is the psychological crutch -- that's  
5 the term they use -- that keeps people from quitting  
6 smoking. Because addicts can be in denial. Addicts  
7 can look for a place where they can live within  
8 themselves with guilt. So if you say, Hey, this one  
9 might not kill you; this one doesn't have those  
10 additives. It's organic; that must be healthier.  
11 The addicted mind of a reasonable addicted consumer  
12 is going to hue towards that safe harbor -- which  
13 there is no such thing as a safe cigarette; they're  
14 all uniformly lethal. If you smoke them long enough,  
15 they're going to kill two out of three people.

16 It's not like pharmaceutical products  
17 litigation Your Honor may have presided over, where 1  
18 percent or a fraction of 1 percent of people are  
19 harmed by a product: Mesh, or the hips, or the  
20 Takata airbags, or the Volkswagen, you know,  
21 emissions.

22 These cigarettes, when used as intended,  
23 reliably will kill two-thirds of their customers. So  
24 that's the weird thing about cigarettes is they  
25 look -- we make them look like -- the industry makes



1       them look like a normal thing. They reduce the  
2       appreciation of level of threat.

3               So it's reasonable some consumers are going  
4       to think those things are safer. And there isn't  
5       anybody in science, in the law, in the courts, in the  
6       federal regulatory bodies that has said any  
7       different. The reasonable consumer is going to think  
8       those cigarettes are safer. It's un rebuttable  
9       science. And it's uniform throughout the law in the  
10      United States. Any tobacco case will tell you that.  
11      That Discount Tobacco Lottery, which Reynolds is also  
12      a plaintiff, is -- it's a revelatory case, because it  
13      really lays out the history of things. And it does  
14      address quite a few of the arguments that defendants  
15      make in support of its motion to dismiss, which is  
16      why I continue to refer to it.

17             Thanks, Judge.

18             THE COURT: Thank you, Mr. Schlesinger.

19             Did you have anything you wanted to add on  
20      that, Ms. Wolchansky, before I let Mr. Schultz have  
21      the last word on that claim?

22             MS. WOLCHANSKY: Just extremely briefly,  
23      Your Honor. I think that the point is -- you know,  
24      Mr. Schlesinger is making arguments up here.

25             I heard Mr. Schultz say several times, We

1 don't think that a reasonable consumer would believe  
2 this to be misleading, and talking all about what,  
3 you know, he thinks a reasonable consumer may or may  
4 not do in this instance, or may or may not believe  
5 with respect to "natural, additive-free, organic."  
6 We don't have to listen to any of that, Judge. All  
7 you have to do is look at the complaint. And the  
8 complaint is full of allegations, and the case law  
9 where courts, with much less evidence than what we  
10 have in the complaint, have found that it is  
11 absolutely inappropriate on a motion to dismiss, when  
12 there is evidence of this magnitude suggesting that  
13 this is misleading to a reasonable consumer, it is  
14 not our place at this point in this litigation to  
15 talk about what a reasonable consumer may or may not  
16 find misleading.

17 THE COURT: Well, here's my concern about  
18 that sort of pleading and standard, is that it seems  
19 to gut Federal Rule 12 (b)(6) of any meaning in a  
20 case like this. Because the plaintiffs could find an  
21 expert, put it in its report, and say that, then, the  
22 Court can't make any independent determination of,  
23 say, materiality in a securities action, or here,  
24 reasonable consumer. It would seem to gut it, just  
25 because we're saying that we've got a report here

SANTA FE OFFICE  
119 East Marcy, Suite 110  
Santa Fe, NM 87501  
(505) 989-4949  
FAX (505) 843-9492



MAIN OFFICE  
201 Third NW, Suite 1630  
Albuquerque, NM 87102  
(505) 843-9494  
FAX (505) 843-9492  
1-800-669-9492  
e-mail: info@litsupport.com

1 that says a reasonable consumer would go the other  
2 way. I mean, isn't it ultimately for the Court to  
3 decide whether a reasonable consumer would do that or  
4 not?

5 MS. WOLCHANSKY: It's not. I mean, this is  
6 why we have juries. It is a fact question.

7 THE COURT: Well, but I mean, I have to  
8 determine this on -- I mean, otherwise, you're saying  
9 that because you put the words "reasonable" into a  
10 complaint, I can never grant a motion to dismiss a  
11 negligence claim, for example, which is based upon  
12 reasonableness. So, I mean, that can't be the  
13 standard.

14 MS. WOLCHANSKY: Well, it is the standard  
15 in this case -- in a case like this, where we're  
16 talking about misleading advertising, and what was  
17 misleading to the public -- you want to call it a  
18 reasonable consumer -- but the whole point, and the  
19 reason why we don't do that at this stage is because  
20 there is so much evidence that is important.

21 So if the Court is going to --

22 THE COURT: Don't courts do this all the  
23 time? That's the reason we've got a 100-page motion  
24 and a 100-page response is because people know that a  
25 lot of times the ball game is this hearing?

1 MS. WOLCHANSKY: Well, not on an issue like  
2 this, where the factual --

3 THE COURT: So no judge in the country has  
4 ever granted a motion to dismiss in a consumer case?

5 MS. WOLCHANSKY: Judge, I would not  
6 represent that. But what I will tell Your Honor --

7 THE COURT: They do it all the time, don't  
8 they?

9 MS. WOLCHANSKY: No, not in this context.  
10 The majority of courts do not, in this context, rule  
11 on a motion to dismiss that a reasonable consumer is  
12 a matter that can be decided --

13 THE COURT: Why should I do anything  
14 different here than what I do in a securities case?  
15 I mean, for example, you line up the complaints, and  
16 I say: That one is not misleading, this one is  
17 misleading, let's go the trial on the misleading  
18 ones.

19 MS. WOLCHANSKY: Because especially in a  
20 case like this, where we have so much evidence at  
21 this stage of what is in fact -- I mean, if Your  
22 Honor wants to do that, then it should come out on  
23 the other side, that it could absolutely be  
24 misleading to a reasonable consumer. We have all of  
25 this scientific evidence. We have surveys. We have

1 courts saying that it's misleading; Judge Kessler  
2 says "natural" is misleading to a reasonable  
3 consumer, that it suggests health benefits. We have  
4 the FDA that's warning that it's misleading. We have  
5 the FTC that's warning that it's misleading. We have  
6 consent orders that go to the advertising because  
7 it's misleading.

8 So if anything, if Your Honor wants to make  
9 a determination as a matter of law, it should be that  
10 this could be misleading to a reasonable consumer.  
11 But we're not even asking Your Honor to go that far.  
12 What we're asking Your Honor to do -- this is  
13 tobacco. We have legacy databases full of  
14 information and documents. We have evidence that  
15 will come in in this case that's not just about the  
16 experts that we'll put forward, which of course will  
17 be self-serving, as will the defendant's. We'll find  
18 experts that say what we believe is true. So will  
19 the defendants.

20 It's their own internal information and  
21 documents that we are entitled to, in discovery in  
22 this case, to prove not only that a reasonable  
23 consumer was, in fact, misled, but they knew it. And  
24 they did this intentionally in order to deceive that  
25 reasonable consumer.

1           So in all of the cases that Your Honor will  
2     see in the complaint, there is not even nearly the  
3     evidence on a reasonable consumer that we have here.  
4     So has a court in this country granted a motion to  
5     dismiss? Of course. The defendant cited most of  
6     those cases that are -- they're going to cite the  
7     best cases for them. But those cases are dealing  
8     with very, very simple -- evaporated cane juice, or  
9     soy milk on the front of a label. Not a mass  
10    marketing scheme, targeted at deceiving consumers in  
11    tobacco like the Lights, like low tar. I mean, this  
12    is a case where there is so much evidence that, to  
13    find at this stage, and to start weighing that  
14    evidence, is just simply contrary to the majority of  
15    the case law in the country.

16           THE COURT: All right. Anything else on  
17    that theory, Ms. Wolchansky?

18           MS. WOLCHANSKY: No. Thank you.

19           THE COURT: Thank you.

20           Mr. Schultz, do you want to have the last  
21    word on that first theory?

22           MR. SCHULTZ: Your Honor, I don't believe  
23    we have in this case more to add.

24           THE COURT: Well, let me ask you on this  
25    point. She's telling me: Don't weigh the evidence,

1 and that's what I'm doing up here by stating that I'm  
2 having trouble with this first theory. Is that what  
3 I'm doing? I'm weighing the evidence. And there's  
4 Judge Kessler, she's a reasonable mind; if she comes  
5 out the other way, I ought to let this go forward  
6 just because Judge Kessler said that "natural" didn't  
7 have any meaning, and that that is enough to create  
8 maybe a factual issue for the jury?

9 MR. SCHULTZ: Your Honor, absolutely not.

10 You were correct the very first time I  
11 raised this issue in what your response was. This is  
12 a 12(b)(6) motion. A 12(b)(6) motion, the standard  
13 is very clear. And the Supreme Court in both Twombly  
14 and Ashcroft made it very clear that that standard --  
15 the standard that the Court was articulating on  
16 plausibility applied across the board.

17 THE COURT: Well, in fact, Twombly was a  
18 patent case, wasn't it -- or it's an antitrust case?

19 MR. SCHULTZ: It's an antitrust case, and  
20 then Ashcroft applied it to all cases. And the  
21 language from the Ashcroft case is exactly the  
22 standard that this Court has cited in its earlier  
23 cases. Quote, "The tenet that a court must accept as  
24 true all of the allegations contained in a complaint  
25 is inapplicable to legal conclusions. Threadbare

1 recitals of the elements of a cause of action  
2 supported by mere conclusory statements do not  
3 suffice."

4 It is your job, Your Honor, as a gatekeeper  
5 for the litigation process to make the determination.  
6 As you said, you line up the language in the  
7 complaint. You read it, in terms of what is  
8 plausible. And you make a determination which cases  
9 are legally sufficient and which are not.

10 And in this case, Your Honor, the question  
11 of the reasonable consumer, this is a matter that is  
12 properly decided on a motion to dismiss under the  
13 plausibility standard.

14 Your Honor, the only issue we have not  
15 talked about on the reasonable consumer question is  
16 their last claim. And I'll just touch on that very  
17 briefly.

18 We agree with the comment you made at the  
19 very beginning of the hearing, Your Honor:  
20 Cigarettes don't appear out of thin air, no matter  
21 what they contain. The only way that a cigarette  
22 appears in that package is if they undergo some sort  
23 of manufacturing process.

24 So for the plaintiffs to claim because the  
25 word "natural" appears, or because that it says



1 "additive-free," that that implies that somehow these  
2 cigarettes magically do appear, without being touched  
3 by human hands, without undergoing a manufacturing  
4 process, is not reasonable, and does not pass the  
5 plausibility standard for a 12(b)(6) motion.

6 The only conclusion that a reasonable  
7 consumer could have, reading the language, whether  
8 it's of the package or of the advertisements, is that  
9 the term "natural" refers to the tobacco inside the  
10 cigarettes, and not that the cigarettes themselves  
11 were being sold without the use of any manufacturing  
12 process. It's simply not possible for a cigarette to  
13 appear in any other way.

14 So, Your Honor, if you have any other  
15 questions, I'll be glad to address it. But,  
16 otherwise, I think that concludes our presentation on  
17 the reasonable consumer.

18 THE COURT: All right. Let me hear the  
19 plaintiffs on this one, and then we'll hear further  
20 arguments on the motion to dismiss. Ms. Wolchansky.

21 MS. WOLCHANSKY: I will keep it brief, Your  
22 Honor, so we can keep this moving. But again, I will  
23 incorporate all of my arguments on why this is not  
24 appropriate at this stage to talk about what a  
25 reasonable consumer -- who that reasonable consumer

1 is; is it a reasonably-addicted consumer. These are  
2 all things that we will talk about in discovery in  
3 this case, what the reasonable consumer looks like in  
4 this case. But what "natural" means to a reasonable  
5 consumer on this pack of cigarettes, given what it  
6 looks like -- all of the, you know, the corresponding  
7 imagery on the pack.

8 But what I will say is again, why does this  
9 say "natural"? So if it's not a natural process; if  
10 it, in fact, goes through the manufacturing process  
11 that all other cigarettes go through, they are not  
12 special, why are these labeled differently? So if  
13 you're a reasonable consumer, and we're talking here  
14 about what would a reasonable consumer believe,  
15 they're going to believe it doesn't go through a  
16 manufacturing process like that. Because if they all  
17 go through the same process, why is this different?  
18 Why do they call it out as "natural" and it's  
19 different and it's premium, if it doesn't, in fact,  
20 do anything different? It goes through the same  
21 exact manufacturing process as every other cigarette.

22 THE COURT: But I thought Mr. Schlesinger  
23 said -- even he conceded that there is a difference  
24 between the way they manufacture Marlboros and the  
25 way they manufacture these; that it's a different

1 product. Isn't that the reason they put it on, and  
2 they get some marketing advantage from that in  
3 today's environment by putting that on there?

4 MS. WOLCHANSKY: No. I mean, every  
5 cigarette manufacturer is going to manufacture their  
6 product in some different way. They're going to  
7 include some additive. Some chemical will have its  
8 own unique manufacturing. But it's the point, if  
9 you're calling something "natural" -- and there is so  
10 much case law now why natural means something to  
11 consumers, that consumers in this day and age,  
12 organic, natural, they're important to consumers, and  
13 they cause people to buy a product. And here we have  
14 all the allegations --

15 THE COURT: Isn't that sort of the lesson,  
16 it means something to the businesses that are selling  
17 the product. It means something to the consumers.  
18 And rather than just saying it doesn't mean anything,  
19 don't we need to go in and say, Well, we need to  
20 match the expectations of the purchasers of these  
21 products with what the representations of the  
22 corporations are? And it may differ. I mean, for a  
23 marshmallow natural may mean something quite  
24 different than natural oranges, for example. But  
25 don't we have to go in and deal with that?

1 MS. WOLCHANSKY: So "natural" here means  
2 safer and healthier, and it also means that it's  
3 manufactured in a way that is natural. And the truth  
4 is, it's not.

5 I mean, if we're going to talk about  
6 weighing the evidence at this stage --

7 THE COURT: How would you manufacture  
8 differently a cigarette than using an engineering  
9 process? I mean, you know, assuming there is a  
10 tobacco plant, and you end up with a cigarette that's  
11 rolled -- you're not rolling your own like the  
12 cowboy -- how do you -- what consumer is going to  
13 think there is not some engineering in that process?

14 MS. WOLCHANSKY: I think the question is  
15 what's the threshold of the reasonable consumer? I  
16 mean, obviously, they know it's not being rolled by  
17 hand.

18 THE COURT: They're not rolling it like the  
19 cowboy.

20 MS. WOLCHANSKY: Right. But the question  
21 is: Okay, are they using highly engineered  
22 processes, flue curing the tobacco --

23 THE COURT: What does that mean, though?  
24 Highly engineered processes? I don't understand, why  
25 is a consumer going to say: This is a lower

1 engineering process, and I didn't expect it to be a  
2 higher engineering process? I don't understand what  
3 that even conveys.

4 MS. WOLCHANSKY: So again, I mean, I will  
5 start with on the firsthand --

6 THE COURT: If they used a lower  
7 engineering process, would that be natural for you?

8 MS. WOLCHANSKY: Well, I think that there  
9 is a lot of case law -- and this is exactly why this  
10 is a question for a jury. We will get up there and  
11 tell the jury why, in fact, this is not natural,  
12 because in the entire engineering process for these  
13 cigarettes, we will have discovery. We will go  
14 through how exactly these products are made; that  
15 they are -- that there is flue curing to make it  
16 inhalable; that they use water. How do they soak it?  
17 How do they put the nicotine back into the cigarette  
18 so every cigarette has the exact amount of nicotine?  
19 How do they do that? And is that natural? That is a  
20 question of fact for a jury.

21 So for us to stand here in the courtroom  
22 today and talk about, based on world experiences,  
23 what a reasonable consumer might or might not think  
24 "natural" has a meaning in the market. There is tons  
25 of case law that we've cited that it means to

1 consumers, and it has definitions; it's been  
2 studied --

3 THE COURT: But it sounds like you're  
4 talking about a kosher cigarette; that it has to be  
5 manufactured in a particular way for it to be natural  
6 Just like you have to do certain things to really  
7 label it kosher. What is the natural process of  
8 making a cigarette?

9 MS. WOLCHANSKY: Well, I think the point  
10 is: What isn't it? And it is not --

11 THE COURT: No, no, no. Answer my  
12 question. What's the natural process of making  
13 cigarette?

14 MS. WOLCHANSKY: Well, I don't think that  
15 there is a single answer of what is the one  
16 manufacture -- I think the point is, Your Honor, that  
17 to stand here and say what a reasonable consumer -- a  
18 reasonable consumer would not believe that the things  
19 that are done in these cigarettes to create and make  
20 these cigarettes, in manufacturing these cigarettes  
21 would be natural. And so, if we're talking about  
22 tobacco that is grown, how the menthol is, in fact,  
23 put into these cigarettes, the additives that are in  
24 these cigarettes, the processes that are used to make  
25 these cigarettes, those are not natural.

1           So to turn it on its head, and require a  
2     consumer to say exactly what a natural process would  
3     be, it's certainly not what they're doing here.

4           THE COURT: Is this a correct statement of  
5     your theory here that using the term natural to  
6     describe the tobacco in Natural American Spirit  
7     cigarettes suggests that the cigarettes are not  
8     subject to engineering processes? Is that a fair  
9     characterization of your theory?

10          MS. WOLCHANSKY: Again, to suggest that  
11     they are rolled in -- I won't stand here and be  
12     unreasonable with the Court to suggest that they're  
13     hand-rolled.

14          But again, I would turn the Court to the  
15     case law on "natural." And the FDA -- and again,  
16     this isn't food, but there is plenty of authority out  
17     there to talk about what highly engineered  
18     products -- how those are not to be considered  
19     natural.

20          THE COURT: That's what confusing me. I  
21     don't understand what high engineering -- and I  
22     assume there is then a corollary of low engineering.  
23     And that because you're alleging that this is highly  
24     engineered processes, but that low engineering  
25     process might be natural, that's the message that's

1 not resonating with me.

2 MR. SCHLESINGER: Let me try to clarify,  
3 Judge.

4 Look at one of these packs. Just take a  
5 look at one of these packs. Look at the front of the  
6 pack. You asked Melissa what would be natural. On  
7 the front of the pack you see the Native American  
8 smoking a peace pipe. That's an example of natural.  
9 Because the natural state of tobacco or cigarettes is  
10 uninhalable. It is puffed in the mouth ceremonially  
11 by Native Americans as part of religious and mystical  
12 ceremonies. It was puffed in the mouth. The mouth  
13 has got the surface area of a tennis ball. The lungs  
14 have got the surface area of a tennis court. Tobacco  
15 was never inhalable. The pH was too high to make it  
16 inhalable.

17 What unleashed the epidemic of addiction in  
18 this country, and corresponding lung disease and  
19 heart disease was the device of the cigarette being  
20 made inhalable by flue curing, which made the sugars  
21 go up very high, lower the pH, so that it could be  
22 inhaled. So a natural cigarette would be a cigar.  
23 Because cigarette means little cigar. And a cigar is  
24 not inhalable. That's why cigars are not associated  
25 with lung cancer.



1           And as Dr. Proctor has testified many, many  
2       times, and will in this case, the cigarette is the  
3       most highly engineered and craftily designed small  
4       device on the planet with billions of dollars of  
5       engineering in it.

6           And as Ms. Wolchansky said to you, even the  
7       term only 100% water and tobacco is not innocent,  
8       because, while they show a rain cloud or a sprinkler  
9       system, what they don't tell you is nicotine is water  
10      soluble. And by rinsing the tobacco with warm water  
11      and spraying it, they can remove all the water  
12      soluble components, including the nicotine, hold  
13      back, and then reapply it with such precision  
14      specificity that it meets pharmaceutical standards,  
15      that every single cigarette in every single pack of  
16      that blue American Spirit before you will contain  
17      precisely the same drug dosage of nicotine. No  
18      matter what cigarette you take out of any one of  
19      those packs anywhere in the country. It's a  
20      precision pharmaceutical device.

21           So when you say natural versus unnatural,  
22      or how high engineering processes, that's part of  
23      facts we'll show, Your Honor. But that's an example  
24      of natural: Uninhalable, puffed in the mouth.

25           THE COURT: Well, that was the reason I was

1 reading the statement that I did, because I did not  
2 understand from the complaint that we were talking  
3 about high engineering processes or lows. It just  
4 said simply "the term "natural" to describe the  
5 tobacco in Natural American Spirit cigarettes  
6 suggests that the cigarettes are not subject to  
7 engineering processes." Now, is that not a fair  
8 characterization of your theory.

9 MR. SCHLESINGER: I think, in part, it  
10 absolutely is. I don't think the average consumer,  
11 particularly a person buying a pack of Natural  
12 American Spirit, organic, additive-free, thinks that  
13 this is going through a complicated, highly  
14 sophisticated development and alteration of the  
15 natural function of tobacco.

16 If you took tobacco from a field in North  
17 Carolina or south Virginia -- which, by the way, is  
18 where these cigarettes are manufactured -- I know  
19 we're out here in Santa Fe, but they don't make Santa  
20 Fe Natural American Spirit, Santa Fe cigarettes here  
21 in New Mexico. They make them in Winston-Salem,  
22 Raleigh-Durham, back at the Reynolds plant with all  
23 the other cigarettes they make. But if you took a  
24 tobacco leaf out of the ground, and you let it dry,  
25 and then you crushed it or cut it, or do whatever,

SANTA FE OFFICE  
119 East Marcy, Suite 110  
Santa Fe, NM 87501  
(505) 989-4949  
FAX (505) 843-9492



MAIN OFFICE  
201 Third NW, Suite 1630  
Albuquerque, NM 87102  
(505) 843-9494  
FAX (505) 843-9492  
1-800-669-9492  
e-mail: info@litsupport.com

1 and you rolled it up in some paper, like the cowboys  
2 used to do, you would not be able to inhale it,  
3 because the pH would be too high, and it would  
4 provoke the gag reflex. Remember, this is fire,  
5 right, fire and smoke. What does a human or any  
6 living thing in the world do to respond to smoke?  
7 They run away. Smoke is a noxious fume. It is a  
8 harbinger of fire, which is dangerous. And smoke  
9 itself is noxious. It provokes a human survival  
10 reaction when inhaled of choking, coughing, and  
11 avoidance. In other words, it's not normal. It's  
12 not natural to pull smoke into your lungs. Nobody is  
13 standing around the campfire roasting marshmallows,  
14 to bring up Your Honor's marshmallow discussion,  
15 leans over the fire and sucks in the smoke, because  
16 you would cough and get sick. And that's because the  
17 body has a survival mechanism where it rejects  
18 dangers and noxious things. Smoke inhalation in a  
19 fire, smoke is deadly dangerous. But it's been  
20 engineered artificially, in ways that consumers can't  
21 possibly understand, but the cigarette companies can,  
22 to permit inhalation into lungs that have no taste  
23 buds, but that are the perfect surface area for a  
24 transfer of nicotine for addiction.

25 So what is the natural process? And

1 they -- and this is part of symbolism and imagery.  
2 The original advertising by Santa Fe used to say the  
3 Native Americans used tobacco for many years without  
4 getting lung cancer, overt health messages that their  
5 way of doing it wouldn't cause cancer. And they show  
6 a Native American smoking a peace pipe. You don't  
7 inhale. That pipe was puffed in the mouth. It was  
8 not inhaled. It was not mass daily consumption.

9 So that answers Your Honor's questions.  
10 That is the natural process. Not the blending and  
11 the mixing, and the removal of nicotine, and the  
12 reapplication so it's as precise as a pharmaceutical  
13 company would have, and a change in the acidity of  
14 the tobacco, along, in some case with menthol, to  
15 permit the inhalation into the lungs. That is what's  
16 so daunting for a regular person out there trying to  
17 make a decision about smoking, to even begin to  
18 conceptualize what's behind that cigarette.

19 MS. WOLCHANSKY: I think the point is --

20 THE COURT: Thank you, Mr. Schlesinger.

21 MS. WOLCHANSKY: It's kind of like the  
22 menthol discussion. The fact that the defendants  
23 claim it's so obvious that it has to go through some  
24 manufacturing process. It's not natural. There is  
25 no question about this process being natural to allow

1       them to use a phrase that they claim is so obviously  
2       not misleading, which is literally false, is why we  
3       have consumer fraud statutes.

4               THE COURT: All right. Thank you, Ms.  
5       Wolchansky.

6               Mr. Schultz, I'll give you the last word on  
7       the engineering process.

8               MR. SCHULTZ: I appreciate it, Your Honor.  
9       I don't believe we have anything more to add.

10              THE COURT: Well, I gave you my  
11       inclinations at the beginning. I appreciate  
12       presentations. But I'm still inclined to let the one  
13       on menthol go forward. I'm still skeptical of the  
14       other two. I do think I have the power to dismiss at  
15       the 12(b)(6) stage. I will read everything again,  
16       and I'll get you an opinion, and I'll certainly  
17       consider the arguments that are made. But I'm  
18       inclined to think that this menthol one is the one  
19       that troubles me. And the other two, it seems  
20       that -- should not go forward because they're not  
21       misleading.

22              Mr. Schultz, is it now time to tackle the  
23       First Amendment? Or tell me roadmap-wise where you  
24       want to go.

25              MR. SCHULTZ: Well, Your Honor, we could

1 actually use some guidance from you at this point.  
2 There are some other issues that are more discrete,  
3 that will have an immediate impact on the case. We  
4 didn't know whether you wanted to move forward to  
5 address those, things like the personal jurisdiction,  
6 the question on the injunctive relief, or whether you  
7 wanted us to plow through the First Amendment, even  
8 though we know that that's an issue that the Court is  
9 hoping not to have to reach.

10 THE COURT: Well, do this -- do y'all -- I  
11 know y'all have got flights, a lot of your counsel  
12 got flights and stuff like that. I want to be as  
13 helpful as I can. We may not get to cover  
14 everything. We may have to do another day, or may  
15 just have to call this. Do y'all want to take a  
16 minute and tell me? I mean, I assume, given my years  
17 of being in your shoes and up here that sometimes  
18 when the judge starts talking, it's helpful to other  
19 things in a case. So if that's helpful to you, then  
20 you ought to argue the issues that you want. So do  
21 y'all want to take a minute?

22 MR. SCHULTZ: If we could, Your Honor, that  
23 would be helpful.

24 THE COURT: Or you can just stand up and  
25 start arguing. You know, tell me what you want to

1     argue.

2                   MR. SCHULTZ:   If we could confer, Your  
3     Honor --

4                   THE COURT:   Go ahead.

5                   MS. WOLCHANSKY:   And we should probably  
6     talk.   If you-all want to talk, then why don't we  
7     talk?

8                   MR. SCHULTZ:   Sure, okay.

9                   THE COURT:   Let me suggest this:   What do  
10    y'all have as far as time-wise?   Here's what I'd  
11    suggest.   I'm going to have to give Ms. Bean a break  
12    to take lunch.

13                   I've got a sentencing at 1:30 that's not  
14    going to take too long.   What if we just took our  
15    lunch break now, y'all can talk however you want to,  
16    and you're not under the gun.   We'll shoot for being  
17    back at 1:00.   I'm going to run an errand, so I'm the  
18    one that's probably going to be the one maybe a  
19    little bit late.   Shoot for being back at 1:00, go  
20    another half hour.   Let me break a little bit and  
21    sentence this person.   And then when y'all need to  
22    get out of here, and you're done, you get out of  
23    here.

24                   MS. WOLCHANSKY:   Your Honor, if I'm getting  
25    out of here today, I would have to get out of here by

1 1:30. I have a 3:00 flight.

2 THE COURT: Okay. Well, that will give us  
3 another 30 minutes. And I maybe it will be a topic.

4 I don't think I can go much further with  
5 Ms. Bean. I need to give her a break. We've been  
6 going another hour and a half. So let's shoot for  
7 1:00. If you need to leave here at 1:30, we'll shut  
8 her down. That will give you time to talk about some  
9 subjects. Does that sound all right?

10 MS. WOLCHANSKY: Maybe there are a couple  
11 of issues we can agree to submit on the papers.

12 THE COURT: That's fine. Or if we need  
13 another day, I'm available. All right. See y'all  
14 about 1:00 o'clock. Y'all bear with me, I'm going to  
15 take a quick run here.

16 (The lunch recess was held.)

17 THE COURT: All right. Mr. Schultz, I'll  
18 let you dictate where we're going this afternoon.

19 And like I said, if people need to leave,  
20 you know, I knew that y'all were expecting a half  
21 day, so --

22 MR. BIERSTEKER: I think we don't really  
23 have an agreement on what to do, Your Honor.

24 THE COURT: Okay.

25 MR. BIERSTEKER: Let me just lay out what



1 I -- the defense would propose.

2 THE COURT: It's your motion. So,  
3 probably, you can argue with it, but probably  
4 whatever the defendants are going to want, since it's  
5 all their motions, I'll probably let them dictate it.  
6 Go ahead.

7 MR. BIERSTEKER: What the defense would  
8 propose is to rest on the papers with respect to  
9 personal jurisdiction over RAI, the mootness issue,  
10 which really only extends to additive-free and  
11 natural, and the safe harbors, because that's only  
12 the safer cigarette theory. It would be an  
13 alternative --

14 THE COURT: Let me ask on the injunctive  
15 relief and mootness issue, it wouldn't moot out the  
16 claim that I'm sort of saying I'm thinking might  
17 survive here, would it?

18 MR. BIERSTEKER: Yeah, I think it would,  
19 Your Honor.

20 THE COURT: Why would it?

21 MR. BIERSTEKER: Because the company will  
22 agree, and has agreed to stop using the descriptors  
23 "additive-free" and "natural." And I thought Your  
24 Honor's problem with the menthol theory was that it  
25 was the confluence of the presence of menthol, plus

1 the claim "additive-free." And if "additive-free" is  
2 removed, as it will be by year end, then it seems to  
3 me that that claim gets mooted.

4 And that would leave, Your Honor, unjust  
5 enrichment and express warranty that we would like to  
6 argue as long as we are here, and perhaps something  
7 very brief that Mr. Schultz would finish up on the  
8 First Amendment, which would be the three central  
9 Hudson factors, only as applied to menthol, would be  
10 our proposal.

11 And I don't want to speak for plaintiffs.  
12 But as I understand it, their proposal is that we  
13 call it a day and come back another time. And there  
14 may be a request for supplemental briefing. But I  
15 don't want to tread on your toes. So go ahead.

16 MS. WOLCHANSKY: So, Your Honor raised a  
17 couple of issues. Obviously, this is really meaty,  
18 and we had space in the brief to address all of these  
19 issues. But now that we're here before the Court,  
20 and this is an important case, and it's likely that  
21 issues might go up to the appellate court, no matter  
22 how it works. Your Honor raised a couple of issues  
23 with regard to the standard on the motion to dismiss,  
24 and the reasonable consumer, and weighing of the  
25 evidence in cases like securities cases, and

1 comparing those to this case here today.

2 So we would like to request some  
3 supplemental briefing, and Your Honor's comments when  
4 we talked in this morning were on the unjust  
5 enrichment and express warranty, that the Court was  
6 kind of looking to us on our argument. And we would  
7 like to spend a fair amount of time on the unjust  
8 enrichment and express warranty, and think that there  
9 is quite a bit on the injunctive relief as well. So  
10 we would like to request some supplemental briefing.  
11 And if defendants had an idea in terms of a  
12 response -- we talked just briefly about this in the  
13 hallway -- and then a second hearing date in 45 days  
14 or so to continue the rest of the argument on the  
15 remaining issues.

16 THE COURT: Okay. Well, let me say this on  
17 supplemental briefing: I mean, I'm pretty generous  
18 on it. If people want to -- as you can tell, I let  
19 people take as much time as they reasonably need to  
20 argue issues. And so I'm not inclined to cut off the  
21 briefing. So, you know, if people want to send me  
22 more material, that's fine. I'll read it, but -- at  
23 least on that issue.

24 Mr. Biersteker?

25 MR. BIERSTEKER: Well, in light of Your

1 Honor's comment, instead of opposing altogether, let  
2 me just plead with you for a very short limitation on  
3 the pages of any supplemental briefing. I mean,  
4 we've had, I think, 200 pages of briefing, including  
5 on the 12(b)(6) issue. I think plaintiff's counsel  
6 indicated from this podium that there were three  
7 pages of cases they cited on the 12(b)(6) issue. And  
8 so I don't know -- I mean, there is one 12(b)(6)  
9 standard; it's the same for all cases. I don't know  
10 that Your Honor mentioned, as hypotheticals, security  
11 cases or negligence cases, or whatever else is a  
12 reason for there to be additional briefing. But if  
13 Your Honor is going to entertain it, I would ask that  
14 basically each side submit one brief in the range of  
15 like five pages. I really would not want to brief it  
16 extensively.

17 THE COURT: What do you suggest, Ms.  
18 Wolchansky?

19 MS. WOLCHANSKY: We would like something a  
20 little more than five pages, but understand that  
21 there is a deep record here. Maybe if we could have  
22 10 pages.

23 THE COURT: Okay. Live with that?

24 MR. BIERSTEKER: Yes, Your Honor.

25 THE COURT: All right. So 10 pages

1 supplemental material. Mr. Biersteker said that you  
2 wanted to call it quits here rather than argue  
3 another 20 minutes.

4 MS. WOLCHANSKY: That's right. We'd like  
5 to -- with the issues that remain, we don't think  
6 that there is anything that we could handle in 20  
7 minutes and respond to. So we'd request another day  
8 of argument to finish, kind of from this point  
9 forward.

10 THE COURT: Which issue did you want to  
11 take up first, Mr. Biersteker?

12 MR. BIERSTEKER: I would have proposed  
13 unjust enrichment, although plaintiffs' counsel just  
14 indicated that that is maybe one of the lengthier  
15 topics, and express warranty would be the two that I  
16 would put first, but --

17 THE COURT: Well, let's do this: Let me go  
18 ahead and hear what Mr. Biersteker says on unjust  
19 enrichment. And if you don't get to respond, then  
20 we'll figure out -- you know, talk to Ms. Wild, and  
21 we can figure out what we're going to do from here.  
22 I want to leave about five minutes to talk to you  
23 about just logistics. So let's go about 15 minutes,  
24 then we'll call it quits.

25 MR. BIERSTEKER: And, I'm sorry, Your

1 Honor, one point of clarification. The additional  
2 briefing is limited to the 12(b)(6) issue; is that  
3 correct?

4 MS. WOLCHANSKY: On the reasonable  
5 consumer, is what we had in mind, what we've  
6 discussed this morning.

7 MR. BIERSTEKER: The 12(b)(6) standard,  
8 okay. All right.

9 THE COURT: All right. Mr. Biersteker, why  
10 don't we go about 15 minutes -- nobody has got a  
11 flight before 3:00, right?

12 MS. WOLCHANSKY: 3:00.

13 THE COURT: All right. So I think we're in  
14 good shape. If you're one of those people that  
15 actually takes the airport's warnings in getting out  
16 there three days in advance, but if you're like me, I  
17 leave the courthouse an hour and 15 minutes, and I'm  
18 usually out there. But you can ask your local  
19 counsel about that.

20 Mr. Biersteker.

21 MR. BIERSTEKER: Yes, thank you, Your  
22 Honor.

23 As to unjust enrichment, there are 12  
24 unjust enrichment claims, Your Honor, and nine of  
25 them fail for at least one, and as many as three

1 additional reasons.

2 And I do have a chart, which I actually  
3 found helpful when I was preparing that -- I'll file  
4 this on ECF if you want, but it's only two pages.

5 THE COURT: Go ahead and give it to me.  
6 But if you don't mind filing it, that would be great.

7 MR. BIERSTEKER: We would be happy to. May  
8 I approach?

9 THE COURT: That way, when I cite it, I can  
10 use it.

11 MR. BIERSTEKER: It's just a way of trying  
12 to keep track of -- the statutory claims are on one  
13 page; the safe harbor boxes are there; the reasonable  
14 consumer standard; and then other. And if you flip  
15 it over you get unjust enrichment and express  
16 warranties, and it allows you to sort of sort through  
17 the claims.

18 But basically, nine of the 12 claims for  
19 unjust enrichment fail, because plaintiffs have an  
20 adequate remedy at law. Their unjust enrichment --  
21 picking up on Your Honor's point from earlier today,  
22 their unjust enrichment claims seek restitution or  
23 discouragement of alleged increased financial gains  
24 obtained by marketing Natural American Spirit  
25 cigarettes as being natural or additive-free tobacco.

1 That's the same legal theory and the same theory that  
2 they advance in support of their money damages  
3 claims, where they seek the price premium that was  
4 allegedly paid because NAS cigarettes were marketed  
5 as containing natural or additive-free tobacco.

6 Plaintiffs initially opposed this aspect of  
7 defendant's motion as premature, claiming that they  
8 are procedurally allowed to plead in the alternative.  
9 And I would observe as to that, that the state's  
10 substantive laws limit the scope of the unjust  
11 enrichment remedy. And where an adequate remedy at  
12 law exists, state substantive law provides that no  
13 unjust enrichment claims exist.

14 This is not a procedural rule against  
15 pleading two claims in the alternative. Federal Rule  
16 of Civil Procedure 8(b), which allows pleading in the  
17 alternative cannot function to change how far state  
18 unjust enrichment law reaches. Nor is the motion to  
19 dismiss premature because of any uncertainty over  
20 whether plaintiffs will prevail upon any of their  
21 statutory claims at law. Rather, the test is whether  
22 a legal remedy is available, not whether the  
23 plaintiffs can succeed on the merits in obtaining  
24 that legal remedy.

25 As one court explained applying Michigan



1 law, and I quote, "The plaintiff does not have to  
2 actually recover under the legal theory for an  
3 equitable claim to be barred. Instead, the  
4 opportunity for plaintiff to recover under legal  
5 theory is sufficient to bar the inequitable claim."  
6 That's the Duffy case, Your Honor, from the Eastern  
7 District of Michigan. That's in our brief.

8 And that makes perfect sense. Why does it  
9 make sense? Equity is a gap-filler. It is meant to  
10 provide a remedy for inequity, where there otherwise  
11 would be none at law. If there is no gap to fill, as  
12 there is here -- and that's because each of the  
13 states has enacted a statute that provides legal  
14 remedies for allegedly false and misleading  
15 advertising, and other sales practices. And to allow  
16 plaintiffs to invoke unjust enrichment would be to  
17 override the considered judgment reflected in those  
18 state statutes, of the extent of the available  
19 remedy, such as to exempt conduct that falls within  
20 the safe harbors. That is not to fill any gap in the  
21 law.

22 Second, plaintiffs argue to the contrary  
23 against our motion, based on mostly inapposite cases,  
24 cases in which the legal remedy was enforcement of an  
25 express contract, and there was a question about

1 whether the contract existed at all, or was  
2 applicable to the dispute. In that circumstance, a  
3 motion to dismiss would be premature, because the  
4 very existence of the legal remedy is in question.  
5 If there is no contract, for example, there is no  
6 suit to enforce it.

7 In all events, there is no dispute here  
8 that the legal statutory remedies exist. And  
9 especially where, as here, the alleged deception  
10 underlying a plaintiff's legal and unjust enrichment  
11 claims is exactly the same, the courts rightly grant  
12 motions to dismiss.

13 Plaintiffs' next sort of general objection  
14 to the motion on this front is to invoke a  
15 presumption under Maine law, that statutory remedies  
16 do not displace common law remedies in Maine,  
17 ignoring that they neither allege a claim under Maine  
18 law, nor seek to certify any class for Maine  
19 purchasers of Natural American Spirit cigarettes.

20 I could turn and discuss the state-by-state  
21 law, if Your Honor would find that helpful, but I  
22 don't know that that is something I can actually get  
23 through in the time allowed.

24 So let me just maybe, instead, touch on the  
25 alternative grounds. But if Your Honor wants me to

1 address the state law, I can do that.

2 THE COURT: Go ahead. Do whatever you'd  
3 like to do.

4 MR. BIERSTEKER: All right. Well, let me  
5 do the state law. And I'll start. Let's start with  
6 the merits under state law. Let's start with  
7 Colorado. I'm just going to do the states sort of  
8 alphabetically. But there is no real disagreement  
9 that in Colorado the existence of an adequate legal  
10 remedy generally bars an unjust enrichment claim.  
11 And that's exactly the rule that was announced in the  
12 decision of the Colorado Supreme Court in the L3  
13 Communications case, upon which plaintiffs rely. L3  
14 Communications also recognized an exception to that  
15 general rule. Unjust enrichment claims under the  
16 exception may piggyback on a legal claim, where the  
17 relief under the unjust enrichment claim is both  
18 distinct from and unavailable under the legal claim.

19 But plaintiffs ultimately do not even try  
20 to explain why their unjust enrichment claim for  
21 restitution of ill-gotten gains caused by defendant's  
22 alleged use of misleading descriptors is distinct in  
23 any material way from their statutory claims to  
24 recover damages equal to an unwarranted price premium  
25 that the plaintiffs say they paid, that was also

1 caused by defendant's alleged use of the misleading  
2 descriptors.

3 Florida: Florida is a little complicated,  
4 but ultimately no less clear. In 1950, the Florida  
5 Supreme Court held -- and I quote, "Where the only  
6 relief sought by a bill of equity is one for which a  
7 plain, adequate, and complete remedy at law exists, a  
8 court of equity has no jurisdiction and resort  
9 thereto is improper and unnecessary," close quote.  
10 That's the Greenfield Village case at page 56 of our  
11 opening brief. The more recent cases applying  
12 Florida law are to the same effect. For example, in  
13 American Honda Motor Company, in our opening brief,  
14 at 57, and reply at 29, the Court characterized as  
15 well-settled Florida's substantive law that an  
16 adequate remedy at law bars an unjust enrichment  
17 claim without any qualification.

18 There was, however, a momentary hiccup in  
19 Florida law in the late 1990s. And it was born of a  
20 mistake, as we explained in Footnote 20, on page 29  
21 of our reply. Let me tell you what it was.  
22 Specifically, in 1997, the District Court for the  
23 Southern District of Florida observed that the  
24 Economic Loss Rule does not apply to claims for  
25 unjust enrichment. That was the ThunderWave case.

1 Later that same year, 1997 -- not 1991, as citation  
2 in our brief would lead you to believe -- later that  
3 same year, in 1997, the Southern District of Florida,  
4 in a case called Mobil Oil Corp v. Dade City, misread  
5 ThunderWave as having decided that the Adequate  
6 Remedy Rule, not the Economic Loss Rule does not  
7 apply to claims for unjust enrichment.

8 ThunderWave did no such thing. In fact,  
9 ThunderWave reaffirmed the rule that an unjust  
10 enrichment claim fails where an express contract  
11 exists, and thus provides an adequate legal remedy.  
12 And the Court in ThunderWave specifically considered,  
13 but rejected support for a contrary conclusion.

14 Mobil, in turn, unfortunately was decided  
15 by an intermediate appellate court decision in  
16 Florida that next year, in 1998 -- that's the  
17 Williams versus Bear Stearns case -- and perpetuated  
18 the misapprehension of Florida law. It is the  
19 Williams case upon which plaintiffs rely in their  
20 opposition. And it was the Williams case, and the  
21 Williams case alone, that the Eleventh Circuit cited  
22 on this issue in an unpublished decision that  
23 plaintiffs claim implicitly overruled American Honda.

24 Once unpacked, there is no real reason to  
25 believe that the Florida Supreme Court would abandon

1 its long-standing rule that an adequate remedy at law  
2 bars an unjust enrichment claim. And the Florida  
3 federal decisions that are more recent are in accord.

4 Again, the Florida cases, except for the  
5 hiccup in the late 1990s apply the rule that an  
6 adequate remedy at law bars claims for unjust  
7 enrichment.

8 Massachusetts: Not even plaintiffs dispute  
9 that under Massachusetts law the existence of an  
10 adequate legal remedy bars an unjust enrichment  
11 claim. They do claim that the district courts in  
12 Massachusetts erred by applying the rule to legal  
13 remedies that were, quote, "merely available  
14 regardless of the claim's validity." But nowhere do  
15 plaintiffs challenge the two Massachusetts Court of  
16 Appeals decisions applying the Adequate Remedy Rule  
17 cited in our opening brief.

18 In Santagate versus Tower, a decision of  
19 the Massachusetts Appellate Court, the court there  
20 rejected an unjust enrichment claim because the  
21 plaintiff, and I quote, "has made no showing that its  
22 remedy at law based on the contract is inadequate."

23 In Taylor, by the district court in  
24 Massachusetts, even though the plaintiff there  
25 asserted no legal claim, the court granted summary

1 judgment on the plaintiff's unjust enrichment claim  
2 because the plaintiff had an unasserted adequate  
3 remedy at law.

4 Defendants could have cited still more  
5 cases applying the same principle under Massachusetts  
6 law. I'd be happy to do that, if Your Honor wishes.  
7 But the truth is, Massachusetts law is clear about  
8 this.

9 At the end of the day, plaintiffs provide  
10 Your Honor with no reasoned basis grounded in  
11 Massachusetts law for disagreeing with the  
12 Massachusetts Federal District Court decisions.  
13 Plaintiffs themselves rely upon two federal court  
14 decisions in Massachusetts: The Lass case from the  
15 First Circuit, in 2012, and Deponte -- which I'm sure  
16 I'm mispronouncing, which is a district court case in  
17 2014.

18 In Lass, there was a dispute, however,  
19 about whether the contract applied to the dispute in  
20 question. And as explained here, there is no  
21 question that a Massachusetts statute provides for  
22 legal relief as a result of false and misleading  
23 advertising.

24 The Deponte court specifically noted that  
25 the defendant had not argued that a remedy in unjust

1 enrichment is unavailable because there was an  
2 adequate legal remedy. So they didn't even reach the  
3 issue.

4 Michigan: Two different opinions by the  
5 Michigan Supreme Court establish that an adequate, a  
6 complete, and ample remedy at law bars a suit in  
7 equity. Plaintiffs note the existence of a legal  
8 remedy also must not be doubtful or uncertain.

9 Defendants agree, for example, that a suit  
10 at law in contract, where the existence of the  
11 contract is in dispute -- let me back up. We agree  
12 that in a case where there is an action at law on a  
13 contract, the existence of the contract must not be  
14 doubtful or uncertain, which would make the existence  
15 of a legal remedy doubtful and uncertain.

16 But here, again, there is no doubt that  
17 plaintiffs have an adequate legal remedy under the  
18 status enacted in Michigan. Plaintiffs ultimately  
19 are reduced to arguing that there is doubt, not about  
20 the existence of their statutory claims, but about  
21 whether they ultimately will provide complete relief.  
22 But that's not the test, as explained on page 30 of  
23 our reply brief, as held in the Duffy case, which is  
24 what I quoted at the beginning of this argument, a  
25 decision by the District Court for the Eastern



1 District of Michigan just last year. The  
2 opportunity, and I quote, "The opportunity for  
3 plaintiff to recover under a legal theory is  
4 insufficient to bar the equitable claim.

5 New Jersey: New Jersey law is clear,  
6 Judge.

7 THE COURT: I'll tell you what, before we  
8 tackle New Jersey, I think we better bring it to a  
9 close, Mr. Biersteker.

10 So let me ask some logistics. Y'all tell  
11 me what you want me to do. Do you want me to stand  
12 down and just wait for additional briefing? Wait  
13 till we have an argument? Do you want me to start  
14 working on the opinion, particularly on the  
15 preemption issues and the claims that we have?

16 Ms. Wolchansky, what would you like for the  
17 Court to do?

18 MS. WOLCHANSKY: We would ask that the  
19 Court wait for the supplemental briefing; that we set  
20 an additional day to come back, and that the Court  
21 take the entire matter under advisement at the  
22 completion of the next hearing.

23 THE COURT: At the completion.

24 How about you, Mr. Biersteker? What would  
25 you like the Court to do?

1 MR. BIERSTEKER: I would prefer if Your  
2 Honor were to start working on the opinion as to  
3 those matters. We've already fully briefed and  
4 argued.

5 THE COURT: All right. Well, we end the  
6 day in complete agreement on how we should proceed.  
7 So I'll figure it out. I was going to -- you know,  
8 this is going to be a lot of work. I don't think  
9 y'all would deny that, even if you're not going to be  
10 the one to draft it. And so I'm trying to figure out  
11 whether I've got clerks that are going to be around  
12 long enough to see this process through, or do I need  
13 to double-up clerks on this, or something like that.  
14 But given that there is no agreement, you don't have  
15 to worry about that. I'll think about that  
16 internally.

17 All right. I appreciate y'all's  
18 presentations. Sorry we didn't get it all done  
19 today. Maybe we'll start on Monday next time, and  
20 we'll go as long it takes to get it all done.

21 Be safe on your travels. Have a good  
22 weekend.

23 (A discussion was held off the record.)

24 MR. BIERSTEKER: I was also going to ask  
25 about timing on briefing.

1 MS. WOLCHANSKY: Depending on when we can  
2 get a date, I want to make sure we have enough time  
3 on the brief, and give the Court enough time to have  
4 reviewed everything before we come back again. So --

5 THE COURT: Ten pages I think I can handle.  
6 So don't worry about me.

7 MR. BIERSTEKER: Do you want us to confer,  
8 Your Honor, separately, and then we'll get back to  
9 Your Honor? Would that make sense?

10 THE COURT: I think Ms. Wild wants a  
11 decision now.

12 MS. WOLCHANSKY: I think we'd like 30 days,  
13 21 days? I saw the eye roll. It was so subtle, it  
14 was hard to dismiss.

15 MR. BIERSTEKER: I'm sorry. I'm really  
16 transparent.

17 THE COURT: Well, you know, I don't -- I'm  
18 not going to sit here with bated breath. It's not  
19 going to matter. Take your 21 days. Do you want  
20 simultaneous, or do you want to respond?

21 MR. BIERSTEKER: No, we'll respond, I don't  
22 know, two weeks.

23 THE COURT: Two weeks? Is that all right?  
24 I'm glad we end on such agreement. We at least end  
25 on eye rolls, right? At least you're not making it

1 at the judge.

2 Y'all be safe.

3 Do you know how much time you'll need to  
4 finish the hearing? Give me an estimate of how much  
5 time; when y'all call in, how much time you want to  
6 finish.

7 MS. WOLCHANSKY: I think a morning. I  
8 think a half a day. I just think we should be  
9 realistic, depending on what the First Amendment --

10 THE COURT: If you think it's a half day, I  
11 can give you July 25 at 1:30.

12 MS. WOLCHANSKY: We don't need a whole day.

13 MR. SCHULTZ: Your Honor, I will be in a  
14 jury trial with Judge Franchini in state court that  
15 starts on the 17th. We're scheduled for 10 days, so  
16 the 25th is not available for myself.

17 MS. WOLCHANSKY: Is there anything the week  
18 of the 17th?

19 MR. SCHULTZ: I start my jury trial.

20 MS. WOLCHANSKY: I'm sorry, on the 17th.  
21 August 2?

22 THE COURT: August 3rd at 8:30?

23 MS. WOLCHANSKY: I have an oral argument in  
24 New York on that day.

25 THE CLERK: August 4?

1 MS. WOLCHANSKY: Is there anything on the  
2 1st or 2nd of August?

3 THE CLERK: The 1st would probably work  
4 okay, Judge.

5 THE COURT: The 1st work for everybody?

6 MR. SCHULTZ: Yes, sir.

7 THE COURT: August 1st, Mr. Biersteker?

8 MR. BIERSTEKER: I have to turn on my  
9 phone. I'm sorry. I was confident about my  
10 schedule.

11 MS. WOLCHANSKY: Andy, is your trial two  
12 weeks?

13 MR. SCHULTZ: Yes, we have a firm setting,  
14 we're number one on the docket. We pick the jury the  
15 17th.

16 THE COURT: What kind of case is it?

17 MS. WOLCHANSKY: Michael is in Japan.

18 MR. SCHULTZ: Your Honor, it is an abuse  
19 case that Mike Hart and I are co-counseling.

20 THE COURT: August 1st may work. Who is  
21 going to be in Japan?

22 MS. WOLCHANSKY: Michael.

23 THE COURT: You can call in, Mr. Reese.

24 MS. WOLCHANSKY: From Japan?

25 MR. REESE: I'd like to.

1 THE COURT: So the 9th, is that what we're  
2 working on?

3 MS. WOLCHANSKY: If it's not before the  
4 1st, the 9th doesn't matter. Either John or I will  
5 take the First Amendment issue, right? Let's just do  
6 the 1st.

7 MR. SCHLESINGER: Yes, Judge, that's  
8 probably the best.

9 THE COURT: The 1st for the plaintiffs, 1st  
10 for the defendants? 8:30, August 1st. I think  
11 that's a Monday.

12 THE CLERK: Tuesday.

13 MS. WOLCHANSKY: I'm sorry. I have a  
14 mediation on the 31st. I don't know how I'm going to  
15 get here. I can't get here.

16 THE COURT: Where is your mediation?

17 MS. WOLCHANSKY: It's in Minneapolis but  
18 it's all day. I wouldn't be able to get here.  
19 Unless we do the afternoon on the 1st. I can get  
20 here.

21 THE COURT: That's fine, if it's all right  
22 with the defendants. Y'all want to do the afternoon?  
23 Minneapolis, we got a lot of flights in and out.  
24 We've got direct flights.

25 MS. WOLCHANSKY: I know. I can get here in

1 the evening on the 31st.

2 THE COURT: How about doing this: Find out  
3 when you --

4 MS. WOLCHANSKY: Why don't I just call you.  
5 Do you want us to confer?

6 THE COURT: Well, why don't you do this:  
7 Why don't you find out when you'll be here, and we'll  
8 set the hearing then, according to your flight time  
9 in.

10 MS. WOLCHANSKY: Okay.

11 MR. REESE: I'm not exactly sure. I'm not  
12 my scheduler. I may have something available that  
13 week, sometime that week. I'm not quite sure.

14 MS. WOLCHANSKY: We'll figure out --

15 THE COURT: Okay. So we'll set it August  
16 1st. All right. We'll set it for August 1st, and  
17 we'll leave the time fluid, depending on -- we'll set  
18 it for 8:30, so there will be a notice. But we'll  
19 leave here with the understanding that we may have to  
20 adjust that backward depending upon flight times.

21 MS. WOLCHANSKY: I'm sure we're jinxing my  
22 mediation that it will go all day.

23 THE COURT: If they pay you money, you  
24 don't care, do you?

25 All right. Y'all be safe. Have a good

1 weekend.

2 (The Court stood in recess.)

3  
4  
5  
6  
7  
8  
9  
10  
11  
12  
13  
14  
15  
16  
17  
18  
19  
20  
21  
22  
23  
24  
25  
  
SANTA FE OFFICE  
119 East Marcy, Suite 110  
Santa Fe, NM 87501  
(505) 989-4949  
FAX (505) 843-9492

**BEAN**  
**& ASSOCIATES, Inc.**  
**A**  
PROFESSIONAL COURT  
REPORTING SERVICE

MAIN OFFICE  
201 Third NW, Suite 1630  
Albuquerque, NM 87102  
(505) 843-9494  
FAX (505) 843-9492  
**1-800-669-9492**  
e-mail: info@litsupport.com



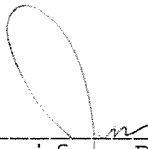
C-E-R-T-I-F-I-C-A-T-E

UNITED STATES OF AMERICA

DISTRICT OF NEW MEXICO

I, Jennifer Bean, FAPR, RDR, CRR, RMR, CCR,  
Official Court Reporter for the State of New Mexico,  
do hereby certify that the foregoing pages constitute  
a true transcript of proceedings had before the said  
Court, held in the District of New Mexico, in the  
matter therein stated.

In testimony whereof, I have hereunto set my  
hand on June 13, 2017.

  
\_\_\_\_\_  
Jennifer Bean, FAPR, RMR-RDR-CCR  
Certified Realtime Reporter  
United States Court Reporter  
NM CCR #94  
333 Lomas, Northwest  
Albuquerque, New Mexico 87102  
Phone: (505) 348-2283  
Fax: (505) 843-9492

SANTA FE OFFICE  
119 East Marcy, Suite 110  
Santa Fe, NM 87501  
(505) 989-4949  
FAX (505) 843-9492

**BEAN**  
**& ASSOCIATES, Inc.**  
PROFESSIONAL COURT  
REPORTING SERVICE

MAIN OFFICE  
201 Third NW, Suite 1630  
Albuquerque, NM 87102  
(505) 843-9494  
FAX (505) 843-9492  
1-800-669-9492  
e-mail: info@litsupport.com